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On owning information: intellectual property and the restitutionary impulse

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ON OWNING INFORMATION: INTELLECTUAL PROPERTY AND THE RESTITUTIONARY IMPULSE

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INTRODUCTION: THE MISAPPROPRIATION EXPLOSION

EVERY day someone invests time, labor, or money in creating a valuable intangible. Someone collects information, creates an idea, designs a boat hull, writes a book, or comes up with a new way to market a product that someone else developed. Judicial treatment of these and other cognate occurrences has shifted dramatically in recent years.

For significant periods, epitomized by the decisions in *Sears, Roebuck & Co. v. Stiffel Co.*¹ and *Compco Corp. v. Day-Brite Lighting*,² courts resisted common law intellectual property.³ The courts were conscious of their limited institutional capacities for measuring the

¹ 376 U.S. 225 (1964) (holding state unfair competition law that prohibited the copying of unpatented lamps preempted by federal patent law).

² 376 U.S. 234 (1964) (holding state unfair competition law that prohibited the copying of unpatented light fixtures preempted by federal patent law).

³ See, e.g., *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (dismissing diversity jurisdiction suit seeking common law protection against the copying of then-uncopyrightable fabric designs because "the Constitution allows only Congress" to grant a creator the power to prevent any imitation of his work), cert. denied, 281 U.S. 728 (1930).

Writing in 1940, Zechariah Chafee suggested that the courts were engaged in cautious exploration but that a broad scope for unfair competition had been rejected. Zechariah Chafee, Jr., *Unfair Competition*, 53 Harv. L. Rev. 1289 (1940). Howard Abrams suggests that the judicial pendulum has swung in both pro- and antiprotectionist directions over the 20th century. Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 Sup. Ct. Rev. 509, 518-32. A mid-century example of the willingness of courts to give rights in intangibles is *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), aff'd, 107 N.Y.S.2d 795 (1951) (enjoining commercial copying and selling of opera broadcasts).

effects of new intellectual property rights⁴ and of the deference owed to federal power in the area.⁵ In addition, a tempered hostility to intellectual property that went beyond questions of federal preemption or of legislative versus judicial competence was discernible during these periods.⁶ Courts often perceived copying and other forms of free riding as acceptable means of serving public demand, and they recognized the virtues that inhere in competition.⁷

Then, about twenty years ago, the judicial tide began to turn in a clearly proprietarian direction. In the United States Supreme Court, several state law rights in intangibles were upheld against preemption challenges.⁸ The Court also spoke approvingly of state restrictions on the copying of intangibles on grounds of preventing unjust enrichment and of providing economic incentive to creators.⁹ The reversed tide quickly accelerated. In some quarters, the traditional suspicion toward intellectual property soon was replaced by its opposite: an eager acceptance of the voracious notion that beneficial products of human effort—works of visual art, information, computer programs, inventions, designs, ideas, or symbols of celebrity—should yield court-protected rewards for the persons who create them, discover

⁴ See, e.g., *Cheney Bros.*, 35 F.2d at 281 (Hand, J.) (“[W]e are not in any position to pass upon the questions involved We must judge upon records prepared by litigants . . . [that] cannot disclose the conditions of this industry, or of the others which may be involved.”); see also *International News Serv. v. Associated Press*, 248 U.S. 215, 262-67 (1918) (Brandeis, J., dissenting) (advocating reasons for preferring legislative resolution of the issues presented).

⁵ Pursuant to the U.S. Constitution, art. I, § 8, cl. 8, Congress has enacted copyright and patent statutes.

⁶ See Chafee, *supra* note 3, at 1317-21 (discussing “four reasons of social policy which render judges cautious”); see also Richard H. Stern & Joel E. Hoffman, *Public Injury and the Public Interest: Secondary Meaning in the Law of Unfair Competition*, 110 U. Pa. L. Rev. 935, 935 (1962) (describing the conflict between the “public injury” rule and the misappropriation doctrine).

⁷ Thus, in *Sears*, the Court wrote: “‘Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.’” *Sears*, 376 U.S. at 231 (quoting *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122 (1938)); see James A. Rahl, *The Right to “Appropriate” Trade Values*, 23 Ohio St. L.J. 56 (1962).

⁸ See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding state trade secret law not preempted by federal patent law); *Goldstein v. California*, 412 U.S. 546 (1973) (holding state statute criminalizing the commercial copying of phonograph records and tapes not preempted by federal copyright law).

⁹ See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-77 (1977) (discussing both incentives and unjust enrichment in upholding against First Amendment challenge a state right of publicity in performances).

them, or give them popularity.¹⁰ Further, courts seemed to assume that ownership was the most appropriate form for this reward to take.¹¹

Although federal preemption continues to prevent states from imposing many kinds of restraints on the copying of products,¹² today states are creating new intellectual property rights in a host of areas. Under the rubric of "misappropriation,"¹³ or under sister doctrines

¹⁰ See generally David Lange, *Recognizing the Public Domain*, *Law & Contemp. Probs.*, Autumn 1981, at 147, 151-71 (describing the new developments).

¹¹ See, e.g., *Carpenter v. U.S.*, 484 U.S. 19, 25-26 (1987) (upholding a newspaper's property right in prepublication confidentiality and exclusive use of information compiled by its reporters); *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 532-35 (1987) (upholding statutory limited property right in word that acquired value due to entity's efforts and expenditures); *Zacchini*, 433 U.S. at 573 (terming human cannonball's interest in being paid for a broadcast of his act a property right); *Factors Etc. v. Pro Arts*, 579 F.2d 215, 221-22 (2d Cir. 1978) (holding that under New York law Elvis Presley's right of publicity was a transferable, survivable property right). But see *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586-87 & n.2 (2d Cir. 1990) (noting the judicially created right in *Factors* is probably preempted by state statute), cert. denied, 440 U.S. 908 (1979).

¹² See, e.g., *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989) (holding a Florida statute that prohibited the "direct molding" of boat hulls preempted by federal patent law). The Court in *Bonito Boats* specifically noted that "all state regulation of potentially patentable but unpatented subject matter is not ipso facto pre-empted by the federal patent laws." *Id.* at 154. The proper scope of preemption is a much-debated issue. See Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. Chi. L. Rev. 1009, 1020-26 (1990) [hereinafter Gordon, *Toward a Jurisprudence of Benefits*].

¹³ In terms of precedent, the new developments find their roots in the 1918 Supreme Court case of *International News Serv. v. Associated Press* ("*INS*"), 248 U.S. 215 (1918), in which the Court enjoined the copying of uncopyrightable "hot news" on the ground, inter alia, that the copyist was "reap[ing] where it ha[d] not sown." *Id.* at 239. This decision, announced as pre-*Erie* federal common law, gave birth to the tort of "misappropriation," an amorphous cause of action that had little effect in the initial decades after its emergence. See Edmund W. Kitch & Harvey S. Perlman, *Legal Regulation of the Competitive Process* 29-31 (4th ed. 1989) (discussing the early disinterest in the *INS* doctrine). *INS* also was thought largely interred by the *Sears* and *Compco* decisions. See, e.g., Jolm P. Dawson, *The Self-Serving Intermeddler*, 87 *Harv. L. Rev.* 1409, 1415-16 (1974). In recent years, the misappropriation tort has reemerged with such vigor that in the 1980s the Supreme Court relied heavily on *INS* in its most recent ruling that information is property. See *Carpenter v. United States*, 484 U.S. 19, 26-27 (1987) (construing federal statutes governing wire and mail fraud); see also *San Francisco Arts & Athletics*, 483 U.S. at 532 (relying in part on *INS* in finding a federal statutory property right in the word "Olympics" valid against First Amendment challenge). Today, the tort of misappropriation is asserted in a wide range of areas and also is used as a source of analogy, inspiration, and authority in sister doctrines such as the "right of publicity" and "dilution," in which its concerns often are joined by other issues, such as privacy. On the general impact of *INS*, see Douglas G. Baird, *Common Law Intellectual Property and the Legacy of*

such as the “right of publicity”¹⁴ and “dilution,”¹⁵ state and federal judges (the latter applying an often-conjectural version of state law¹⁶), are expanding state law to give creators of intangibles both tort and property rights in the “fruits of their labors.” In the process, traditional defenses to the creation of such rights based on notions of public interest are sometimes improperly resisted¹⁷ and desirable prerequisites for suit ignored.¹⁸

At least until recently, decisions construing relevant federal statutes or constitutional clauses showed a similarly expansive willingness to

International News Service v. Associated Press, 50 U. Chi. L. Rev. 411 (1983) (discussing *INS*'s impact on the development of intellectual property rights).

¹⁴ The right of publicity began as an outgrowth of the right of privacy, but many jurisdictions now treat it as property—fully assignable and descendible, as well as potentially perpetual. See Sheldon W. Halpern, *The Law of Defamation, Privacy, Publicity, and “Moral Rights”* 537-85 (1988). As property, it owes much to misappropriation doctrine. See, e.g., Robert C. Demicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 Wis. L. Rev. 158, 173.

¹⁵ Dilution is a species of state trademark right that, in its purest form, frees the owner of a strongly distinctive trademark from any obligation to prove consumer confusion when a use of his mark would “dilute” its distinctiveness. See 2 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 24:13, at 212-15 (2d ed. 1984) (defining dilution). For an explication of the rationale behind dilution, see Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813 (1927).

¹⁶ See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (construing California law as granting singer a right against imitation of her voice in a commercial).

¹⁷ For example, courts otherwise sensitive to First Amendment and other public policy considerations seem to lose that sensitivity when dilution is involved. One court went so far as to hold that a form of truthful comparative advertising could trigger liability under the dilution rationale. *Sykes Lab. v. Calvin*, 610 F. Supp. 849, 856-58 (C.D. Cal. 1985) (holding defendant's description of its product, which referred to plaintiff's trademark, capable of offending the dilution statute, impliedly without regard to whether the two products were indeed identical). Contrast this approach with the perspective of traditional trademark law, as in *Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968) (holding that a seller of inexpensive perfumes is entitled to use famous trademarks to describe accurately the fragrances the seller's products imitated, provided of course that the use did not create a reasonable likelihood of confusion as to the product's “source, identity, or sponsorship”).

¹⁸ See, e.g., *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84, 90 (Ill. 1983) (holding that competition between the parties is not a prerequisite to a misappropriation suit). For a disagreement between federal courts on whether to simplify plaintiffs' tasks in intellectual property litigation, compare *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004, 1012 (5th Cir.) (holding that defendant's sale of embroidered team emblems could constitute trademark infringement even without a showing that consumers were confused as to the source and origin of the physical goods sold), cert. denied, 423 U.S. 868 (1975) with *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 920 (9th Cir. 1980) (adhering to the traditional understanding that confusion about origin, sponsorship, or endorsement should be a prerequisite to a plaintiff's suit), cert. denied, 452 U.S. 941 (1981).

grant rights against strangers who would use what others have made.¹⁹ The Supreme Court's recent ruling that noncreative compilations of facts should receive no copyright protection may check some of those developments.²⁰ The very decision that so restrained federal copyright protection for facts, however, unfortunately may have opened the door to *state-granted* private ownership rights in information.²¹ Litigants probably are gearing up already

¹⁹ In copyright, for example, it long had been understood that the social costs of giving ownership in expression were tolerable because facts remained free for all to use. Then, many copyright courts began to grant relief that swept facts into the protectionist net. See *National Business Lists v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 92 (N.D. Ill. 1982) (finding an infringement even though defendant's use of facts in plaintiff's compilation did not copy the expressive form of plaintiff's arrangement, in part because of the "injustice of permitting one to appropriate the fruit[s] of another's labor"); see also *Harper & Row, Publishers v. National Enters.*, 471 U.S. 539 (1985) (holding that the copying of less than 400 words from presidential memoirs constitutes an infringement of federal copyright law); *West Publishing Co. v. Mead Data Cent.*, 799 F.2d 1219 (8th Cir. 1986) (holding West entitled to a preliminary injunction to stop LEXIS from showing the internal page numbers of judicial opinions in West Publications), cert. denied, 479 U.S. 1070 (1987). Justice William Brennan asserted in his *Harper & Row* dissent that "the Court's fair use analysis has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history," something he attributed to a misplaced reliance on Locke and natural law. *Harper & Row*, 471 U.S. at 590 (Brennan, J., dissenting).

²⁰ See *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991) (holding that a telephone utility could not copyright the white pages of a telephone directory).

The narrowing effect of this recent case—excluding information from legal protection—may be restricted to copyright law. In noncopyright settings, the Supreme Court twice has declared information to be property—once in the context of the Fifth Amendment's takings clause, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and once in the context of a federal statute whose scope was "limited . . . to the protection of property rights." *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). Standing alone, neither case directly grants an information producer a common law right of action against strangers who use the information. Unfortunately, the cases may be used to buttress just such results. See Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 *Cath. U.L. Rev.* 365 (1989) (suggesting that *Ruckelshaus* and *Carpenter* may have an unfortunately expansive impact on intellectual property law). In addition, other recent expansions of copyright law remain unrebuked. See, e.g., *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) (reversing judgment for defendant despite the fact that defendant's imitative greeting card copied neither copyrighted text nor copyrighted artwork).

²¹ The Supreme Court indicated in *Feist* that noncreative compilations of fact lie outside the purview of Congress' copyright power. 111 S. Ct. at 1294. The opinion, therefore, can be read as hinting that state protection for facts might not be preempted.

The Court indicated that under the Constitution federal copyright can protect only original works of authorship and that "[f]acts are never original." *Id.* The Court suggested that facts by their nature have no human "origin." See *id.* at 1287-89 (discussing the originality

to pursue that avenue, although preemption remains a strong possibility.²²

requirement); see also *id.* at 1288 (“Census-takers . . . do not ‘create’ the population figures that emerge from their efforts. . .”).

If one assumes *arguendo* that the Court will stand by its dictum that “facts” cannot “originate” with people, the *Feist* analysis might lead a proponent of state protection of facts to argue: (1) that the section of the Copyright Act dealing with preemption, 17 U.S.C. § 301 (1988), is exhaustive on the preemption question; (2) that § 301 says that subject matters outside the scope of copyright are open to state protection; (3) that *Feist* declares that facts are outside the scope of copyright; and, therefore, (4) that states are free to give ownership rights or other rights in facts.

The Supreme Court could have ruled the white pages unprotected by copyright law on nonconstitutional grounds. The traditional interpretation of the Copyright Act long has been that Congress made a policy decision not to give protection to facts themselves, and the statute seemed to say clearly that compilations of facts could be protected only insofar as their creative arrangement and selection were concerned. See 17 U.S.C. § 101 (1988) (definition of “compilation”); *id.* § 102(b); *Financial Information v. Moody’s Investors Serv.*, 808 F.2d 204 (2d Cir. 1986), cert. denied, 108 S. Ct. 79 (1987). Such a statutory, nonconstitutional approach would have provided a secure basis for preemption of state attempts to change the balance that Congress set between protection and nonprotection. Instead, the Court reached out to the Constitution, suggesting that perhaps Congress in its copyright law constitutionally cannot make choices about the protection of facts because facts are not “original.” Its choice of reasoning, parroting Nimmer on Copyright that facts are not original, unnecessarily allows the opinion to be interpreted as giving implicit permission for state law activism. *Feist*, 111 S. Ct. at 1288-89 (citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 2.03(e), 2.11(A) (1990)). It seems to say that protecting facts is simply none of Congress’ business under the Copyright Clause.

The Court’s observations about the inherent noncreativity of facts are unnecessary to the result. Even if the facts had been “created,” the plaintiff telephone company had not created them. *Feist*, 111 S. Ct. at 1296-97. Further, the majority’s view of reality is flawed crucially: some facts are original even if some are not. After all, one’s address does not cease to be a fact upon a showing that the name of one’s street originated in the fancy of a housing developer. Facts are not “already there, suspended in the ether.” Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965, 996-97 (1990) (asserting that facts “do not exist independently of the lenses through which they are viewed,” but rather can be as original as conventional works of authorship); see also Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoehling v. Universal City Studios*, 29 *J. Copyright Soc’y U.S.A.* 647, 658 (1982) (arguing that the central fallacy of the “Platonic fact precept” is the belief that facts merely exist and thus may be uncovered, but not created). A false dichotomy between fact and expression has proved troublesome in other areas of copyright law as well. See Pierre N. Leval, *Fair Use or Foul*, 36 *J. Copyright Soc’y U.S.A.* 167 (1989); Pierre N. Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105 (1990) (arguing that courts incorrectly reject defendants’ arguments that they should be privileged to quote copyrighted expression when they use it as fact).

²² Despite *Feist*, § 301 might be applied to preempt state protection. See Dennis S. Karjala, *Copyright and Misappropriation*, 17 *U. Dayton L. Rev.* (forthcoming 1992) (arguing that because some compilations still are protected by copyright, compilations that fail to attain copyright because of a lack of originality are to be governed solely by federal law). Further, even if § 301 is read as not preempting state protection, see *supra* note 21, state attempts to

I suspect that this common law trend²³ toward granting new intellectual property rights has been fueled largely by two forces. On the one hand is an intuition of fairness—a norm often linked to natural rights—that one should not “reap where another has sown.”²⁴ On the other hand is a set of empirical developments: the gradual decline in our nation’s industrial/manufacturing sectors, the dramatic growth of high-tech information industries, and the perception that our nation’s wealth is declining relative to that of other nations. As the economic hopes of a less confident, service-oriented economy have become

give ownership in facts may be vulnerable on preemption grounds independent of § 301. For example, the First Amendment exists as an independent constraint on state protection for facts, 2 Paul Goldstein, *Copyright: Principles, Law, and Practice* §§ 15.2.3, 15.3.3 (1989), though the Supreme Court so far has proved reluctant to apply the amendment to intellectual property rights. *Id.* § 10.3, at 241-43, § 15.20.2.3. In addition, state protection for facts could raise the specter of inconsistent state rulings and interference with interstate commerce. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *Colum. L. Rev.* 1865, at 1901 n.141 (1990) (discussing what she terms “horizontal” preemption). Most importantly, general principles of “vertical” constitutional preemption—the inquiry into whether state law would interfere with congressional intentions—should remain available despite the existence of § 301. See, e.g., 2 Goldstein, *supra*, § 15.2.3, at 489 n.65, § 15.3.3, § 15.9.2; Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1025. Under the latter standards of constitutional preemption, the *Feist* argument that “facts” are not “original” can be accepted without opening a door for state protection of facts.

The Supreme Court, in *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989), recently reaffirmed that when the existence of a particular balance between protected and public domains is an important presupposition of congressional action, the states are not free to upset that balance. *Id.* at 152. *Bonito Boats* struck down a state statute prohibiting the copying, via plug-molding, of boat hull designs. The Court noted: “implicit in the Patent [and Copyright] Clause” of the Constitution is the “understanding” “that free exploitation of ideas will be the rule”; the effectiveness of the patent regime “depend[s] almost entirely on a backdrop of free competition in the exploitation of unpatented designs and innovations.” *Id.* at 151.

Analogously, the unprotectability of facts is an essential assumption behind Congress’ grant of a lengthy and easy-to-obtain term of copyright protection, see *infra* note 33 and accompanying text. Under such an analysis, state protection of facts that alters that background condition should be preempted *pro tanto*. Under *Bonito Boats*, then, facts should remain unprotected by state law regardless of whether they are “original” and in spite of state desires to implement reap/sow arguments.

²³ As courts have expanded intellectual property rights, legislatures also have granted broader rights. See, e.g., 17 U.S.C. §§ 302-305 (1988) (lengthening the duration of copyrights). This Article, however, concentrates on the distinct issues raised by the institutional capacities and self-conceptions of the judicial branch of government; legislative expansions of intellectual property rights are beyond the scope of this discussion.

²⁴ See *infra* notes 62-77 and accompanying text. Justice Brennan chastised his brethren for drawing on a natural rights tradition in a copyright case in which they indirectly prohibited the copying of information. *Harper & Row, Publishers v. National Enters.*, 471 U.S. 539, 580 (1985) (Brennan, J., dissenting).

increasingly dependent on the nation's intangible assets,²⁵ legislatures and courts seem willing to extend intellectual property protections on the questionable, and surely often unconscious, assumption that protection means prosperity.²⁶

Although an initial jump toward creating private rights in intangibles therefore may be understandable, it is nevertheless imperative that these case law developments be refined before the effect is quite the opposite of that intended. Our intangible assets are indeed valuable, but an overbroad grant of monopoly rights to prior creators may retard the development of new intellectual products²⁷ and sometimes may interfere impermissibly with the autonomy of others and with efforts by individuals to achieve cultural self-determination. Indeed, some of the current developments threaten to chill more creativity than they induce, and they may impair our culture's ability to respond flexibly to future opportunities and dangers.

After all, the potential free riders—the users, copyists, and adapters—are not mere parasites. Many are creators themselves. They may reach markets different than those reached by the original creators, or they may bring new perspective, reduced cost, special expertise, deeper insights, or innovative technology to the exploitation and adaptation of established works. It is true that very often such putative defendants would be able to obtain licenses to utilize the valuable work and that, in those cases, giving the creator protection would not inhibit the flowering of derivative works and new uses.²⁸ But, at other

²⁵ “[T]he United States has been for some time the world's largest exporter of copyrighted works.” Marshall A. Leaffer, *Understanding Copyright Law* § 12.5 (1989); see also *id.* at 351 n.38 (stating that the value of exported movies exceeds that of the steel we import).

²⁶ Aside from making possible our adherence to international treaties—which is primarily a province of legislative rather than judicial action—increased protection for intellectual property plaintiffs here is not likely to contribute much to America's relative international position, because domestic and international protections largely are independent of each other. Copying by non-Americans is most prevalent on other nations' soil, and broadening domestic prohibitions on free riding likely will not persuade foreign governments to give American authors more protection against copying in their countries. In general, when works created in the United States are copied in a foreign country, that country's copyright law, not the law of the United States, governs any legal action. See 2 Goldstein, *supra* note 22, §§ 16.2-16.3.

²⁷ Cf. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. Legal Stud.* 325, 333-44 (1989) (arguing that an intellectual property right given to current creators will increase the future costs of creation); Rahl, *supra* note 7, at 72 (stating that “our economy would still be in the Dark Ages” if all imitation were forbidden).

²⁸ See generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *Colum. L. Rev.* 1600, 1605-13 (1982)

times complications, such as transaction costs, strategic maneuvering, and income effects—or the perceived inappropriateness of using a market to mediate certain qualitative judgments—will leave us less than satisfied that the grant of a property right to an initial creator will lead to optimal economic development or to optimal opportunities for cultural and individual expression.²⁹

Indeed, federal intellectual property statutes and the well-established intellectual property precedents exhibit a recognition that the enforcement of intellectual property rights may “stifle the very creativity which that law is designed to foster”³⁰ and that the law must grant something *less* than a right to all the benefits one’s work generates.³¹ Consequently, traditional intellectual property law has drawn dividing lines to resolve the tensions that inevitably arise between the desire to give creators incentives and the desire to encourage dissemination and use of creations.³² Similarly, among the three major federal statutes in the area—copyright, patent, and trademark—the duration of rights is proportional to the social costs of the relevant package of entitlements: the greater the costs, the shorter the duration

[hereinafter Gordon, Fair Use] (describing the mechanism in the copyright context whereby the value of resources (for our purposes, the resources that go into producing intangibles and the intangibles themselves) is maximized via consensual market transfers).

²⁹ *Id.* at 1613-46 (advocating employment of a fair use privilege to alleviate market failures); Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1042-43 (outlining the economics of suppression). In addition, of course, intellectual property rights sometimes afford their possessors a degree of monopoly power, which typically imposes deadweight losses in the form of reduced output. See William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 *Harv. L. Rev.* 1659, 1702 (1988) (defining “deadweight loss” as the sum of (1) “the consumer surplus that would have been reaped” by consumers who value the product at more than its marginal cost of production but not highly enough to be willing to pay the monopoly price and (2) “the producer surplus that would have been reaped by the copyright owner had he sold the work to them”).

³⁰ *Iowa State Univ. Research Found. v. American Broadcasting Co.*, 621 F.2d 57, 60 (2d Cir. 1980) (*dicta*).

³¹ *Berlin v. E.C. Publications*, 329 F.2d 541, 543-44 (2d Cir.) (granting fair use to a *Mad Magazine* parody of plaintiff’s song despite defendant’s free ride), *cert. denied*, 379 U.S. 822 (1964).

³² Thus, in copyright, ownership of a book’s copyright gives the owner no exclusive rights in the ideas or facts the book might convey. The Supreme Court, having restated this principle in *Harper & Row, Publishers v. National Enters.*, 471 U.S. 539, 556 (1985), gave it bite in *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991); see also 17 U.S.C. § 102(b) (1988) (copyright protection does not extend to ideas or concepts). Further, statutory exemptions and doctrines such as fair use that limit creators’ rights and compulsory licenses force certain creators to let others use their works at a price set by a government entity. See 17 U.S.C. §§ 107-114 (1988).

of protection.³³ The new developments disregard many of the old lessons about the importance of drawing lines and setting limits. Instead, the recent tendencies seem based on the assumption that any use of an intangible is improper unless preceded by consent and compensation to the intangible's creator.

Admittedly, this new growth may not be all bad. Just as tort law can be termed a jurisprudence of harms, the misappropriation and related cases may constitute the first building blocks of an elaborate modern jurisprudence of benefits.³⁴ In many ways, these cases even

³³ Roughly speaking, one finds that the less important the subject matter and the less extensive the creator's rights of control, the lower the social cost of reduced access and the longer the protection tends to last.

Traditional trademark law imposes little social cost. It gives mark-holders rights only against the use of arbitrary symbols, configurations, and brief combinations of words. Those rights are assertable only in limited product-identifying contexts. Even in such contexts, the "genericism" doctrine precludes protection by trademark of words used in their ordinary English-language meanings. 15 U.S.C. §§ 1052(e)(1), 1064(3) (1988). Trademark law does not restrain use of configurations that enhance the functionality of an object. *In re Morton-Norwich Prods.*, 671 F.2d 1332 (C.C.P.A. 1982). Further, an action in trademark infringement was traditionally available only where the defendant's use of the mark threatened to cause consumer confusion. *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912 (9th Cir. 1980), cert. denied, 452 U.S. 941 (1981). Giving someone this limited control over this limited subject matter has little social cost. Not surprisingly, trademarks that retain their meaning for the public need never expire.

At the other extreme, utility patents give inventors a highly valuable monopoly, good against independent replication as well as against copying, and the patentee's rights are particularly costly to society in the short term because they limit competition in the making of utilitarian objects. But, in the absence of special legislation, patents last at most for seventeen years. See 1 Peter D. Rosenberg, *Patent Law Fundamentals* § 1.06 (rev. 2d ed. 1991).

At what one might term the mid-range, copyrights give creators rights only over expression, not over facts and ideas. 17 U.S.C. § 102(b) (1988). Courts even will deny authors protection for their expression when necessary to preserve free access to functional designs. See 17 U.S.C. § 101 (1988) (definition of "pictorial, graphic and sculptural works" excludes mechanical or utilitarian aspects). Courts also will deny protection to expression with which an idea is intertwined inextricably. See *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (denying copyright for a series of short instructions, where "at best only a limited number" of possible forms exist, lest the use of the underlying idea be constrained). Further, copyrights give creators rights only against use of their own work, as opposed to rights over independent replication. 17 U.S.C. § 106 (1988). Thus, the subject matter of copyright is more limited than that of patent, and copyright law gives rights more limited than patent law does. As one might expect, therefore, a copyright's duration is much longer than a patent's.

³⁴ Thus, for example, Professor Raskind has suggested that the misappropriation doctrine provided the "conceptual basis" of the privilege for reverse engineering embodied in § 906 of the Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 901-914 (1988). Leo J. Raskind, *Reverse Engineering, Unfair Competition, and Fair Use*, 70 Minn. L. Rev. 385, 386-87, 404-07 (1985). Note, however, that Raskind also argues that the misappropriation doctrine is too imprecise to provide much assistance in interpreting that section. *Id.* at 407-11.

follow the overall patterns of tort law.³⁵ Just as tort law encourages reasonable care by placing some of the costs of carelessness on those who have the most control over the conduct of dangerous enterprises, the law of intellectual products encourages productivity by placing some of the rewards that productive activity generates into the pockets of those who have control over its level and direction. This is, of course, the familiar notion of internalization. Persons who create valuable benefits by writing books, collecting information, composing music, or designing boat hulls may produce more of such valuable things if they expect to be paid for at least some of the benefits their efforts yield.³⁶ One way to ensure such payment is to give producers a right to sue³⁷ when strangers indulge in specified modes of benefit-

³⁵ By "tort law" here I mean to refer to the usual package taught in first-year torts courses—a set of problems focusing on harms done, usually physical in nature. As a matter of nomenclature, misappropriation itself can be defined as a tort, as can copyright infringement, for a tort typically is defined as a cause of action for violation of any noncontractual right. (That this common definition ignores the existence of restitution-based causes of action I put aside as a matter of historical accident. Cf. Douglas Laycock, *The Scope and Significance of Restitution*, 67 *Tex. L. Rev.* 1277, 1277 (1989).) Misappropriation and copyright infringement should be distinguished from ordinary torts, however, because their essential rationales have more to do with internalizing the benefits the plaintiff has generated than with internalizing the harms the defendant has generated. See Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1048-49; Douald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 *J. Legal Stud.* 57 (1984). Putting the necessarily slippery distinction in corrective justice terms, ordinary torts primarily have to do with "unjust loss," whereas misappropriation and its cousins have more to do with "unjust gains."

³⁶ Obviously, desirable behavior also can occur without monetary internalization. Some potential tortfeasors will be careful out of beneficence or squeamishness; some potential authors will write out of a love of words or a desire for attention.

³⁷ Special legal protection is not always necessary to achieve monetary internalization. Some potential harm-causers refrain from careless behavior for monetary reasons unrelated to a fear of tort liability, such as a desire to maintain a good reputation among potential customers. Similarly, some potential benefit-creators invest in productive behavior for monetary reasons unrelated to an ability to sue beneficiaries of their efforts. Loyalty to an author might prevent the making or purchasing of unauthorized copies. Technological fences, such as a computer program's copy-protect device, can be installed to ensure that persons who want to make use of a beneficial product will pay for that privilege, regardless of whether there is a credible threat of suit.

Where intangibles are concerned, it often is argued that the cost of initial production can be so high relative to the low cost of copying that these devices yield insufficient internalization. In other words, the lure of producing and selling low-cost copies is so great that there is strong incentive, as it were, for disloyalty and the evasion of fences. Thus, the argument goes, legal rights over copying must be given to ensure adequate internalization of benefits. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *Stan. L. Rev.* 1343, 1344-54, 1435-46 (1989) [hereinafter

reaping—most notably, the mode known as copying—without permission.

But the jurisprudence of benefits has not yet received the fine tuning that courts and commentators have lavished on tort law.³⁸ In torts, even strict liability is not absolute, and a restitution-for-benefits rule should not be either. Just as some harms should be allowed to lie where they fall without the courts' ordering recompense,³⁹ some benefits should be allowed to flow without court-ordered recapture or payment. At least two parties participate in the creation of either harms or benefits,⁴⁰ and a broad pro-plaintiff rule provides incentives only to one side. In conventional tort law, strict liability is thought inappropriate in areas where plaintiffs as well as defendants should be encouraged to take care.⁴¹ Conversely, in intellectual property law, broad prohibitions on copying may be inappropriate where the efforts of creative defendants in adapting others' work should be encouraged.⁴² A broad pro-plaintiff rule also must be modified to take

Gordon, *Inquiry into the Merits*] (analyzing the debate over whether copyright is necessary for internalization).

³⁸ Some excellent functional investigations of restitution already have been done. See, e.g., Dawson, *supra* note 13; Saul Levmore, *Explaining Restitution*, 71 *Va. L. Rev.* 65 (1985). These studies have not focused, however, on the misappropriation context.

³⁹ For example, in negligence law "reasonably" caused harms are not compensable, *Restatement (Second) of Torts* § 298 (1965), the doctrine of proximate cause limits compensability even for negligently caused harms, *id.* §§ 430-31, and some types of damages (such as emotional harm) are often not compensable even when proximately caused by the defendant's negligent acts. *Id.* § 463A.

⁴⁰ I use the terms "harms" and "benefits" here to be consistent with the usages in tort and restitution cases, respectively. These terms are malleable, however, for both depend upon a prior choice of baseline, a level of welfare that either has been impaired (harmed) or improved (benefited). Cf., e.g., Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* 31-36 (1984) (describing the harm principle as a "mere convenient abbreviation for a complicated statement that includes, among other things, moral judgments and value weightings of a variety of kinds"). See Wendy Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 *J. Legal Stud.* (forthcoming 1992).

⁴¹ See, e.g., *Restatement (Second) of Torts* § 496A cmt. d (1965); *id.* § 523 (1977) (discussing the availability of the assumption of risk defense in a strict liability action). Thus, negligence law leaves some costs "external" to potential defendants' decisionmaking, either by the requirement that plaintiffs bear the costs of nonnegligently caused accidents, or by the application of a contributory or comparative negligence rule. One justification for the failure to force defendants to internalize these costs is the need to encourage plaintiffs to take care by leaving possible accident costs "internal" to *their* decisionmaking. See, e.g., A. Mitchell Polinsky, *An Introduction to Law and Economics* 40-44 (1983) (discussing pedestrian's care).

⁴² See *supra* notes 27-30 and accompanying text.

account of the noneconomic, or "other justice,"⁴³ effects that broad liability and property rules have on potential defendants and on society at large.

Indeed, conventional tort law privileges some valuable activities, such as self-defense⁴⁴ and media discussion of public figures,⁴⁵ which have "other justice" as well as allocative implications. In intellectual property, there must be similar privileges to provide relatively safe harbors for cultural activities such as criticism and satire—to name only two among many valuable activities—and to shelter important commercial activities such as comparative advertising.⁴⁶ Traditional intellectual property law recognizes this need by providing, for example, privileges,⁴⁷ compulsory licensing,⁴⁸ and precise specification of boundaries.⁴⁹ Yet, in many of the recent cases, the courts' myopic focus on the plaintiff's presumed rights has obscured the need to safeguard this dimension of social interest.⁵⁰

⁴³ By "other justice" I refer to all of the considerations not easily captured by monetary value. Cf. Guido Calabresi, *The Costs of Accidents* 24-33 (1970) (discussing "justice" as a goal of accident law distinct from "reduction of accident costs," and essentially as a "veto or constraint" on cost-reduction methods).

⁴⁴ See, e.g., Restatement (Second) of Torts §§ 63-68 (1965).

⁴⁵ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that the First and Fourteenth Amendments protect false statements made about the official conduct of a public official, such that damages may be awarded only if "actual malice" is shown).

⁴⁶ In the copyright arena, at least one court has been willing to allow copying for purposes of comparative advertising, though the basis for the decision remains controversial. *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980).

⁴⁷ In copyright, the most notable example is the fair use doctrine, which provides some privilege of copying to critics and satirists. See 17 U.S.C. § 107 (1988). In federal trademark law, a kind of fair use privileges competitors to make truthful reference to each other's trademarks. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d 562, 567-69 (9th Cir. 1968), *aff'd*, 528 F.2d 284 (9th Cir. 1976) (refusing to enjoin perfume manufacturer from truthful, nonmisleading use of competitor's trademark to identify the product it had copied).

⁴⁸ See, e.g., 17 U.S.C. §§ 111(c), 115 (1988) (mandating compulsory licensing for secondary transmissions by cable systems and for making and distributing phonorecords, respectively).

⁴⁹ One important boundary is duration. See *supra* note 33 and accompanying text. Another aspect of the lines and limits drawn by traditional intellectual property law is the law's precise formulation of the plaintiff's initial case: the insistence upon an *identifiable* entity to be protected, see, e.g., 17 U.S.C. § 102 (1988) (requiring fixation in tangible form as a prerequisite to protection), and identifiable infringing acts, 17 U.S.C. § 106 (1988) (enumerating those acts within the copyright owner's exclusive rights). See Gordon, *Inquiry into the Merits*, *supra* note 37, at 1378-84 (discussing both "thingness as specificity" and the importance of boundaries).

⁵⁰ One example of the contrast between the traditional and modern approaches is the holding that a satire of the Pillsbury Dough Boy was fair use from a copyright perspective but an infringement of the plaintiff's rights under an antidilution statute. *Pillsbury Co. v. Milky*

Because no refined version of the appropriative claim's central assertion—no explication of the conditions under which beneficial effort should generate a noncontractual right to reward—has yet been set forth, many commentators are suspicious of the new intellectual property developments.⁵¹ Some, like myself, fear that the recent developments evidence insufficient attention to the need for sharp lines and boundaries, given that the surface attractiveness of the reap/sow claim, coupled with the vagueness of its perceived natural law roots, can lead to an expansiveness that will choke our cultural and scientific vitality in a morass of suits and fears of suits.⁵² This Article attempts to determine whether the reap/sow claim has any internal boundaries that, if implemented, might help to alleviate such fears.⁵³

Way Prods., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. Dec. 24, 1981). Similarly, when an antidilution claim, see *supra* note 15, was brought by a fingernail-conditioner company that was angered by a competitor's comparative advertising, the court paid lip service to the fair use doctrine of traditional trademark law, which protects such activity so long as it is nondeceptive, but then stated that a cause of action against even truthful comparative advertising might be cognizable under the new antidilution approach. *Sykes Lab. v. Kalvin*, 610 F. Supp. 849, 858 (C.D. Cal. 1985).

Many new cases also ignore the need for boundaries. Thus, when Dow Jones objected to the Chicago Board of Trade's reference to the Dow Jones Industrial Average in a futures-trading contract, Dow Jones found that its copyright infringement suit gained it little. *Dow Jones & Co. v. Board of Trade of Chicago*, 546 F. Supp. 113 (S.D.N.Y. 1982). After finding that the list of stocks making up the average might sustain a copyright, the copyright court considered only those activities that constituted actionable copying in violation of the Copyright Act's enumeration of exclusive rights in 17 U.S.C. § 106 (1988). *Dow Jones*, 546 F. Supp. 113. Reasoning that the Board of Trade's copying had minimal economic importance and thus was most likely protected by a fair use defense, the court refused to grant an injunction. *Id.* In a parallel state suit, however, Dow Jones obtained an injunction against the Board of Trade's planned activity on the vague ground of misappropriation. *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983).

As for duration, the antidilution doctrine and modern trademark cases threaten to give perpetual protection for symbols even when their use causes no confusion as to source or origin. See, e.g., *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg.*, 510 F.2d 1004 (5th Cir.), cert. denied, 423 U.S. 868 (1975).

⁵¹ See, e.g., *Lange*, *supra* note 10; *Samuelson*, *supra* note 20.

⁵² See *supra* notes 27-50 and accompanying text.

⁵³ Clearly, external boundaries exist. Most notably, the First Amendment should trump any reap/sow claim that is inconsistent with free-speech principles, just as the First Amendment trumps any defamation claim that threatens such principles. This is, of course, the lesson of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Also, where Congress has made a discrete policy choice that the enforcement of a reap/sow claim would frustrate, preemption requires that the courts' restitutory impulses give way to Congress' more particular policies. See *supra* notes 12, 21 & 22. Similarly, adherence to judicially forged doctrines that focus on the particular facts of certain contexts may result in the defeat of a claim based on more general reap/sow arguments. See, e.g., *Shiets v. Yamaha*

This Article begins by focusing on an important and accessible question: whether the sense of fairness that seems a primary normative motivator of these courts can, when taken seriously, justify the courts' apparent lack of concern with preserving what is *good* about reaping where one has not sown.

In order to analyze a normative principle, it is first necessary to define it. Thus, Part I of the Article offers three possible understandings of the reap/sow principle. The first two, which I call "status quo corrective justice" and "the property/value" notion, may arise from a judicial desire to protect status quo holdings. Although not fully without boundaries, these versions of reap/sow fail to provide enough sensitivity to the complexities underlying a determination of the appropriate circumstances in which a reap/sow claim might be asserted.

The third interpretation, which I call the "restitutionary impulse," holds more hope for limitation. This interpretation views the reap/sow claim through the lens of a modified vision of corrective justice. It draws on the judge-made area of law known as "unjust enrichment" or "restitution," an area often seen as expressing or even embodying corrective justice.⁵⁴ Because that tradition, by and large, has been quite sparing in granting relief to plaintiffs who generate benefits and then seek payment from beneficiaries who did not agree in advance to pay, it offers the promise of suggesting—heuristically, if not doctrinally—helpful insights for parsing the internal structure of a legal claim based on reap/sow considerations.

Pursuing this avenue, Part II draws on unjust enrichment law and other sources to identify considerations that should limit the reap/

Motors Corp., U.S.A., 849 F.2d 179, 184 (5th Cir. 1988) (holding an inventor who neglected to maintain the secrecy required to prevail on a claim based on state trade secret law not entitled to invoke unjust enrichment principles as an alternate ground for recovery because "[a]n action for unjust enrichment must not be allowed to defeat the purpose of a rule of law directed to the matter at issue"); see also Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 752 (1990) (noting it is appropriate to deny litigants use of courts' "general equity powers" where granting such relief would "evade more particular rules of law").

But this Article pays less attention to such external trumps and countervailing considerations and asks instead whether restitution case law provides any hints as to when it might be inappropriate to rely on a restitutionary claim as a basis, however inconclusive, for recovery.

⁵⁴ See Jules Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 1 J.L. & Phil. 5, 12-13 (1983).

sow impulse. Though the judicial decisions interpreting restitution have no necessary claim to perfection,⁵⁵ past judicial experiments help to illuminate the difficulties inherent in applying this seemingly moral imperative in a real-world context of actual legal process.

Part III, the crux of the Article, then draws on the unjust-enrichment analysis to propose boundaries for the expansive reap/sow impulse. Part III proposes a set of minimum constraints that should condition any judge-made cause of action premised upon the supposed unjust enrichment involved in "reaping" another's intangible. These constraints, which together constitute a slimmed-down misappropriation tort that I call "malcompetitive copying," apply both corrective justice and economic insights drawn from the restitution pattern.

Part IV applies these constraints to two cases involving rights in information,⁵⁶ an area newly vulnerable to state law activism.⁵⁷

This analysis has several potential applications. First, one might view the set of minimum constraints as providing much-needed structure for the reap/sow element of the "hazily defined tort"⁵⁸ of misappropriation.⁵⁹ Second, the analysis suggests that even when it is justifiable to grant information producers or other creators of intangibles a legal right of some kind as a reward for the benefits they generate, significant difficulties arise from using the "property" nomenclature to describe the resulting entitlements. I argue that the relevant criteria justify, at most, contingent and contextual rights and that far more demanding criteria must be satisfied before the act of creating a beneficial intangible should give rise to the strong prima

⁵⁵ See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law: A Progressive Critique* 13, 15 (David Kairys ed., rev. ed. 1990).

⁵⁶ The cases to which I apply the constraints are *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), described briefly supra note 13, and *West Publishing Co. v. Mead Data Cent.*, 799 F.2d 1219 (8th Cir. 1986) (affirming issuance of preliminary injunction against LEXIS' use of page cites to West reporters), cert. denied, 479 U.S. 1070 (1987).

⁵⁷ See supra notes 21-22 and accompanying text.

⁵⁸ Abrams, supra note 3, at 509, 543.

⁵⁹ The Article assesses what must be shown before a *particular kind* of ground can be offered as justification for a right to sue for payment when others use information one has gathered. It does not purport to be exhaustive on all questions related to ownership of information.

facie rights typically associated with "property"⁶⁰ in the common law system.⁶¹

The Article concludes by suggesting that the proposed constraints and the rejection of a "property" approach provide a potentially valuable first step toward articulation of the appropriation boundaries but do not provide fully specified limits. The Article thus submits that even when tied to its unjust enrichment roots, the reap/sow notion remains unduly expansive and, therefore, cannot stand alone as a basis for rights in intellectual products.

I. MODELS OF REAP/SOW

A. *Demystifying the Natural Law Claim*

I begin my inquiry with the observation, shared by many commentators, that at the center of the pro-property wave of cases lies the conviction that it is unjust "to appropriate the fruits of another's labor"⁶² and its corollary, that one should not reap where another has

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 the term "property" here to embrace the particular set of rights associated in the common law with ownership, particularly of real property. See, e.g., Gordon, *Inquiry into the Merits*, supra note 37, at 1354-77 (defining property in the tangible and intangible contexts); A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* 107 (A.G. Guest ed., 1961), reprinted in *Property: Cases, Concepts, Critiques* 78 (Lawrence C. Becker & Kenneth Kipnis eds., 1984).

⁶¹ In our system, a full property right usually gives an owner the right to obtain monetary relief, as well as the right to obtain injunctions. Further, these rights are usually assertable against any intentional boundary crossing, regardless of whether the owner has suffered any loss from the unconsented intrusion or whether the intruder had every reasonable ground for believing his conduct was not wrongful. Restatement (Second) of Torts § 163 cmt. b (1965) (stating that it is "immaterial whether or not [the trespasser] honestly and reasonably believes" he is rightfully on the land); id. § 164 (stating that reasonable mistake is not a defense to trespass on land possessed by another unless the mistake was induced by the possessor). Perhaps most importantly, only very narrow privileges permit the intentional entry or use of others' property, thus typically cutting off inquiry into the beneficial effects of such acts by defendants. See William C. Powers, Jr., *A Methodological Perspective on the Duty to Act*, 57 *Tex. L. Rev.* 523, 526-28 (1979) (reviewing Marshall S. Shapo, *The Duty to Act* (1977)).

⁶² *National Business Lists v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 92 (N.D. Ill. 1982); see also Fisher, supra note 29, at 1688-89 ("authors and inventors *deserve* a reward for their labor and should be given it regardless of whether they would continue their work in the absence of such compensation"); cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-03 (1984) (noting that the "perception of trade secrets as property" is consistent with labor theories of property).

sown.⁶³ One might call this either a “restitutionary” or an “appropriative” notion. “Restitutionary” is the more general term: it reflects a belief that some unspecified rewards are due to those whose labor produces benefits and that when third parties intercept these rewards, the law should intervene to effect their restoration. To conceptualize the underlying impulse as “appropriative” is to reflect a belief that the reward due should take the specific form of a grant of property rights.

Unlike most observers, I do not trace the restitutionary claim primarily to natural law or Lockean labor theory.⁶⁴ Instead, I seek to demystify the “natural rights” claim by tracing the restitutionary notion to two possibilities more rooted in observed practice: first, a particular conception of the judicial role and of the proper relation of common law to the community; and second, a particular conception of unjust enrichment.

One might ask why there is a need to trace the restitutionary principle back to any other source, as there is an obvious moral attractiveness to the idea that it is unjust for an entity to reap where it has not sown.⁶⁵ The simplest answer is that when taken literally, as a stand-alone prohibition on free riding, the restitutionary claim is drastically overbroad. A culture could not exist if all free riding were prohibited within it. Every person’s education involves a form of free riding on his predecessors’ efforts, as does every form of scholarship and scientific progress. Further, a bedrock proposition of the common law is that persons ordinarily should not be required to pay for the benefit of others’ labor unless they have agreed in advance to do so, by con-

⁶³ See *International News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918). A related notion—that the creation of value is a necessary and sufficient basis for granting a legal right against strangers who would seek to appropriate it—sometimes appears. See, e.g., Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 *Notre Dame L. Rev.* 397 (1990) (suggesting that the new growth in trademark law is not required by considerations of economic incentive and presenting a framework for protecting expressive interests against the protectionist tide); Samuelson, *supra* note 20; *infra* notes 106-14 and accompanying text.

⁶⁴ In my view, “Lockean theory” is largely the label courts use for their conviction that it is unfair for one person to take the fruits of another’s labor. I suggest elsewhere that Locke’s own approach, properly understood, leads to far fewer intellectual property rights than has been imagined. See Wendy J. Gordon, *Equality and Individualism in the Natural Law of Intellectual Property* (1990) (unpublished draft manuscript on file with the Virginia Law Review Association) [hereinafter Gordon, *Equality*].

⁶⁵ See *INS*, 248 U.S. at 239-40.

tract.⁶⁶ Although exceptions to this proposition exist, it has yet to be repudiated in the wholesale way that the adoption of an unlimited reap/sow principle would require.

An obligation to pay for benefits received does not apply to all uses of others' efforts or property. It could not.⁶⁷ If even *intentional* interdependence were to trigger liability automatically, it is little exaggeration to suggest that we would all spend our days in court.⁶⁸ The great fear of the common law judges—explosive liability—would be realized, and with it could come societal paralysis.

In addition, most notions of community would require drastic revision. Culture *is* interdependence, and requiring each act of deliberate dependency to render an accounting would destroy the synergy on which cultural life rests. Even if the accounting were done painlessly—by a magic computer that somehow could costlessly determine who contributed what and could prepare a continuously up-to-date, self-executing list of debits and credits—part of our self-concept as a people depends upon our having a common heritage. Parceling out that heritage to only those willing and able to pay destroys part of its value.⁶⁹

⁶⁶ Note that this formulation implicitly refers to benefits not already categorized as "property," for one result of categorizing some benefit (e.g., the wheat I grow) as "property" under common law is to impose on nonowners legal obligations independent of contract: for every "right to exclude" held by an owner, there are "duties to refrain from intruding" imposed on nonowners. See Gordon, *Inquiry into the Merits*, supra note 37, at 1354-65, 1414-25.

⁶⁷ As John Dawson has said:

Uncompensated gains are pervasive and universal; our well-being and survival depend on them. . . . For most of the elements that make life worth preserving no one is ever expected to pay, in part of course for the practical reason that it would be impossible to discover whom to pay or how much.

Dawson, supra note 13, at 1412.

⁶⁸ Thus, Judge Walter Stapleton noted, "We live in an age of economic and social interdependence. . . . General Motors' cars, for example, enjoy significant popularity and seat cover manufacturers profit from that popularity by making covers to fit General Motors' seats. The same relationship exists between hot dog producers and the bakers of hot dog rolls." *National Football League v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D. Del. 1977) (holding, inter alia, that the National Football League had no legal right to prevent the Delaware state lottery from profiting from the popularity of NFL football by making reference to the teams' games).

⁶⁹ Cf. Michael J. Sandel, *Liberalism and the Limits of Justice* 150 (1982) (arguing that community may constitute "a mode of self-understanding partly constitutive of the agent's identity").

We do not earn most of what we have, either in terms of our qualities, such as intelligence, or in terms of the physical world and social structure that allow those qualities to be used to advantage. Unless someone comes along who can demonstrate a better claim than our own to what we have but did not earn, we think it legitimate to keep what we have. Thus, our intuitions suggest that although earning may generate a special claim, not earning does not in itself require divestiture. Free riding, standing alone, assumedly is not wrongful.

Finally, few would consider “just” a world in which people received only that for which they could pay.⁷⁰ Earning is only one way of deserving; those who are unable to contribute—as may be, for example, persons who suffer from a severe mental handicap—nevertheless deserve both respect and some share of social resources.⁷¹ Thus, a blanket prohibition on free riding would contravene some of our most basic moral convictions. A clear need for limiting principles exists if the appropriative claim is to be recognized. The misappropriation case law has yet to provide any.

The appropriative principle is subject to a number of interpretations. One possibility might be that the principle expresses a duty to refrain from using what one has not earned. Under this interpretation, any unearned gain is suspect.⁷² But such an interpretation surely goes too far.

A second interpretation might suggest that one has ownership in anything to which one’s labor attaches.⁷³ That, too, seems a remarkably unattractive principle. People are born at different times, with different opportunities. For one person to be able to trump the interests of one who follows simply because she attached her labor first

⁷⁰ See, e.g., Allen Buchanan, *Justice as Reciprocity Versus Subject-Centered Justice*, 19 *Phil. & Pub. Aff.* 227, 228 (1990) (exploring the idea “that an individual has a right to a share of social resources (or moral rights of any kind) *only* if that individual contributes or at least can contribute to the cooperative surplus”).

⁷¹ See *id.* at 244-45.

⁷² See John P. Dawson, *Unjust Enrichment* 25 (1951) (discussing “Mansfield’s core idea that an unexplained gain received in the form of money must be restored if justice is to be served”).

⁷³ Lysander Spooner urged such a labor-based absolute property right in the area of intellectual property in 1855. Lysander Spooner, *The Law of Intellectual Property*, in 3 *The Collected Works of Lysander Spooner* (Charles Shively ed., 1971).

seems unfair. The morally arbitrary fact of temporal priority would gain too much power.⁷⁴

Moreover, labor in the abstract yields no necessary claim to reward. Labor can be destructive as well as constructive. One who works out of spite to deface an element of nature, for example, seems to have no legitimate ground for complaint when clean-up crews undo her work.⁷⁵ Further, rewards take many forms, and labor's most proper reward may be payment or prizes rather than property.⁷⁶ Although labor may be part of a legitimate principle upon which to base reward claims, it can stand neither alone nor unlimited.⁷⁷

The two interpretations of the appropriative principle that I have raised and rejected appear to rest on a principle of duty that forces us to disgorge anything we have not earned or on a principle of right that gives us an entitlement to those things that our labor touches first. Though each standing alone has obvious flaws, each captures an element of what is needed to make the reap/sow principle attractive. First, as to plaintiff's interest: the intellectual property plaintiff's connection to the matter at issue—be it through earning, labor, or causation—should be sufficiently strong as to make the plaintiff the appropriate person to whom reward is owed. Second, the connection of the defendant to the matter at issue should be less strong than the plaintiff's and of a kind that makes judges believe it appropriate to impose on the defendant a duty not to use, or a duty to pay for, a benefit traced to the plaintiff. A discussion of three potential responses to the reap/sow axiom follows.

⁷⁴ Locke's own theory accommodates this concern for those who come later; it contains a proviso that labor yields property only if "enough, and as good" is left for others. John Locke, *Two Treatises of Government* 134 (Thomas I. Cook ed., 1947) (6th ed. 1764). For a fuller development of this theme, see Gordon, *Equality*, *supra* note 64; Wendy Gordon, *Reality as Artifact: Implications for the Right to Copy*, 55 *Law & Contemp. Probs.* (forthcoming 1992) [hereinafter Gordon, *Reality as Artifact*].

⁷⁵ See Robert Nozick, *Anarchy, State, and Utopia* 175 (1974).

⁷⁶ See generally Lawrence C. Becker, *Property Rights: Philosophic Foundations* 32-56 (1977) (discussing a principle of moral desert that complements and supplements Locke's theory of labor).

⁷⁷ Even if one could develop a fully adequate notion of moral desert as it relates to labor—a notoriously difficult undertaking, see, e.g., *id.* at 32-56; see also Stephen R. Munzer, *A Theory of Property* 254-91 (1990) (arguing that a qualified partial justification for property rights can be found in a labor-desert principle)—such desert can provide only part of a satisfactory justification for property. *Id.* at 266-85.

B. The First Model: Status Quo Corrective Justice

One paradigm that might explain the courts' actions when they implement a reap/sow claim begins with a notion sometimes associated with the phrase "corrective justice." As described by Aristotle,⁷⁸ "corrective" or "rectificatory" justice is a conceptual category, a way of describing the mode of justice appropriate to transactions between two persons.⁷⁹ It is distinguished from "distributive justice," which governs the distribution of benefits and burdens among society as a whole.⁸⁰ Corrective justice disregards the parties' overall moral worth or social contribution—whatever the parties' potential claims to greater or lesser shares of the societal wealth might be is a matter for distributive justice. As between themselves, doer and sufferer are equals.⁸¹ When a wrong by one of them disturbs the balance of equality between them, the imbalance must be corrected.⁸² Rectification of both gains and losses is dictated by justice when "necessary to protect a distribution of holdings or entitlements from distortions."⁸³

A critical problem with judicial application of the Aristotelean conception is that it does not define wrongfulness explicitly but seems to

⁷⁸ Aristotle, *The Nicomachean Ethics* 84-86 (Hippocrates G. Apostle trans., 1975).

⁷⁹ See Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 *Ratio Juris* 211 (1989). In my analysis of Aristotle in this context, I largely adopt Weinrib's formulation.

⁸⁰ Aristotle, *supra* note 78, at 82.

⁸¹ See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 *Chi.-Kent L. Rev.* 407 (1987) [hereinafter Weinrib, *Causation*]. Weinrib extends the relevance of "doer and sufferer" also to unjust enrichment. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *Yale L.J.* 949, 979 (1988) [hereinafter Weinrib, *Legal Formalism*] ("the intelligibility of their relationship [between a plaintiff who has made a mistaken payment and a defendant asked to repay it] is conceptually dependent on the significance of doing and suffering").

⁸² Aristotle gives the example of a wrong in which one person has taken something from the other. Leaving the gain in the wrongdoer's hands causes an imbalance twice as large as the taking itself, whereas requiring its return restores both parties to the prior situation of balance. Aristotle, *supra* note 78, at 84-88.

⁸³ Coleman, *supra* note 54, at 6. Jules Coleman writes:

[C]orrective or rectificatory justice is concerned with wrongful gains *and* losses. Rectification is, on this view, a matter of justice when it is *necessary to protect a distribution of holdings (or entitlements) from distortions* which arise from unjust enrichments *or* wrongful losses. The principle of corrective justice requires the annulment of both wrongful gains and losses.

Id. (emphasis added). Note that Coleman talks of *unjust* and *wrongful* changes in holdings, which is not simply causation-based.

Ernest Weinrib's position also can be understood as applying to both gains and losses. Weinrib, *Legal Formalism*, *supra* note 81, at 979-80 (interpreting restitution as undoing a form of harm).

presume a prior specification of wrongfulness.⁸⁴ Clearly, “[n]ot every loss B suffers at A’s hands is a wrongful one; not every gain A secures at B’s expense is an unjust one.”⁸⁵ How can a court decide what gains are “wrongful” or “unjust” without the guidance of established rights?

One interpretation of corrective justice attempts to solve this problem by assuming that any unjustified change in the status quo—any unmerited loss or unearned gain—constitutes a wrong that must be rectified. This interpretation could lead merely to an allocation of burden of proof such that the recipient must justify his gain, but often it is coupled with a substantively narrow view of justification—that a change is justified only if the person affected has, roughly speaking, agreed to it or caused it.

This principle is associated with “causal maximalism”—the notion that causing an effect is a necessary and sufficient basis for the law to attach that effect to the generator.⁸⁶ Under such a view, “causing benefits” would give one the right to capture and to keep those benefits.⁸⁷ The law should, under this view, seek to join effects with their causers by granting rights and imposing correlative liability.⁸⁸ If this

⁸⁴ See Aristotle, *supra* note 78, at 90-94; Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 *J. Legal Stud.* 187 (1981); Weinrib, *supra* note 79. Similarly, Jules Coleman seems to see corrective justice as dependent upon a prior specification of wrongfulness, or at least a prior specification of transactional norms. See Jules Coleman, *Intellectual Property and Corrective Justice*, 78 *Va. L. Rev.* 283 (1992). Some commentators, however, suggest that substantive notions of wrongfulness can be gleaned from Aristotle’s writings as a whole, and that these express themselves in Aristotle’s discussion of corrective justice as well. See Richard W. Wright, *Reclaiming Corrective Justice*, 77 *Iowa L. Rev.* (forthcoming 1992).

⁸⁵ Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. Legal Stud.* 421, 431 (1982).

⁸⁶ See H.L.A. Hart & Tony Honoré, *Causation in the Law*, at lxxiv (2d ed. 1985) (discussing a more limited version of causal maximalism in the context of the tort law argument that causing harm is a “necessary and sufficient condition of tort liability”).

⁸⁷ Hart and Honoré apply “causal maximalism” only to harms, rather than to all effects, for their focus is on tort law. “That we are responsible for the harm we cause is a principle that makes an immediate appeal to common moral sensibility.” *Id.* at xxxv.

Note that though Hart and Honoré “think it is a moral and legal principle of central importance that people are responsible for the harm they cause, where ‘cause’ is understood not as *sine qua non* but in the sense in which ordinary people understand it,” *id.* at lxxvii, they do not support the view that causing harm is always necessary and sufficient for imposing liability. *Id.* at lxxii-lxxvii.

⁸⁸ This approach to responsibility in turn may depend on a theory of atomistic individualism: the gains and losses each person causes should be assigned to him. Thus, all persons affect each other only as they mutually may consent to be affected.

is so, then people should receive payment for the benefits they cause and, conversely, they should not be entitled to keep the gains that someone else has caused.

If one combines the notion that existing holdings should be protected with this broad version of causal maximalism, the following position emerges: Gains and losses should be incurred and transferred only by methods that conform with notions of individual responsibility. Established methods of consensual transfer such as contract and gift form an acceptable predicate for responsibility, as does causation. Outside of consensual dealings,⁸⁹ the law should assign to each party the gains and losses that it generates, consistent with causation. I call this position "status quo corrective justice," for it seeks to protect the status quo distribution of interests and advantages from disruption.

Richard Epstein's initial articulation of his strict liability theory, in which he argued that various causes of harm—force or fright, for example—should generate liability regardless of fault, apparently relied on something akin to this model of status quo corrective justice.⁹⁰ Epstein has withdrawn from this view, conceding that harms should be actionable only if they violate previously specified *rights*.⁹¹

Standing alone, causation is hardly compelling.⁹² Part of the problem is definitional—what constitutes a "cause" is a much-debated issue.⁹³ Causation is also problematic because it is not coterminous

⁸⁹ Cf. Weinrib, *Legal Formalism*, supra note 81, at 979:

[F]or benefits to have a legal standing, their conferral must conform to specific conditions concerning the transferor's intent and the mechanics of transfer. . . laid down in the law of gifts, trusts, and seals. Other unilateral transfers . . . are invalid. . . . [T]he form instantiated in contract and tort law allows us to think of the payee's retention of a mistaken payment [a form of unearned benefit] as a harm inflicted on the payor.

⁹⁰ See Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151 (1973). I do not mean to overstate the parallels between a full version of causal maximalism and Epstein's position. Epstein's position was limited to several specific ways of causing tangible harm.

⁹¹ Epstein's current position is complex. See, e.g., Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 *J. Legal Stud.* 49 (1979).

⁹² Even Richard Epstein, who is most closely associated with causal maximalism in the tort arena, admits that "causing harm" should generate liability only if one holds a preexisting entitlement to be free of such harm. See *id.* at 59.

⁹³ Commentators generally agree that the "but-for" or "sine qua non" approach to cause provides an insufficient basis for imposing responsibility; thus, it usually is combined with other approaches. Some commentators parse causal questions in terms of common-sense notions, see Hart & Honoré, supra note 86, at 5; others use policy, see, Calabresi, supra note 43, at 6 n.8, 131-97; Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 *U. Chi. L. Rev.* 69 (1975).

with moral desert. If some wholly unforeseeable effect results from one's activity, no obvious moral basis for praise or blame, or for reward or punishment, arises.

The more primitive view—that all status quo holdings *prima facie* are entitled to protection—in fact may animate the courts, however. At least one plausible explanation of tort law's patterns might rest on the view that all harms resulting from nonreciprocal risks (reciprocal risks being a mutual tradeoff and potentially equivalent to consent) constitute a sufficient basis for liability.⁹⁴ The recent growth in intellectual property similarly might be understood as an expression of the view that any benefit resulting from nonreciprocal effort must be paid for.

Even as a description of actual case results, however, this form of corrective justice has the same defect as the appropriative principle itself: it is drastically overbroad. Even as a descriptive matter, all lawyers know that there are interests, termed *damnum absque injuria*, that tort law does not protect. Classic examples of interests sometimes left unprotected, even when they result from nonreciprocal risk, have included emotional and economic harm. Similarly, in unjust enrichment law, although an unearned and nonreciprocally reaped benefit sometimes must be paid for or returned to the one who conferred it, often the recipient will have no obligation to do so.

But if one moves from the protection of specific holdings to the protection of the status quo as a whole, the status quo corrective justice model appears a more apt descriptor, for it is arguable that the interests left unprotected are simply those whose protection would disrupt larger existing patterns. For example, a plaintiff's inability to recover for emotional or economic harm unaccompanied by physical damage often is explained by pointing to the disruptive effect that such liability would impose.⁹⁵ Similarly, a desire to preserve the pre-

⁹⁴ See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972). Fletcher's theory of reciprocity draws on a Rawlsian principle of fairness, that "all individuals in society have the right to roughly the same degree of security from risk." *Id.* at 550. To the extent such an approach took for granted that all current holdings were to be so protected, it would parallel "status quo corrective justice."

⁹⁵ It often is argued that intangible injuries might pose a danger of unlimited liability or chill otherwise-desirable activity, such as competition. See Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 115-32 (1988). But see Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 Stan. L. Rev. 1513,

vailing market system might explain a court's reluctance to compel restitution for all benefits conferred without request.⁹⁶

One can imagine defenses of this drastically conservative notion of law.⁹⁷ One also can imagine attacks upon it.⁹⁸ But, as a descriptive matter it may well capture the assumptions that motivate legal protection of intangible values absent a strong showing that protection will advance some conception of social welfare.

It often is suggested that one way in which courts perceive their role is as protectors of the status quo. For example, Jerry Mashaw suggests that this is part of a traditional paradigm of individualistic adjudication under which judges work to preserve a community's existing distribution of advantages by applying norms derived from that community.⁹⁹ In this model of adjudication, the source of the

1534-35 (1985) (arguing that the concept of avoiding disproportionate liability best explains case law patterns in the economic loss area).

⁹⁶ The origin of the desire to preserve the market system is more likely "economics" in the usual sense. See Levmore, *supra* note 38, at 79-82. Alternatively, however, its origins may lie in "status quo preservation."

⁹⁷ One argument in support of such a perspective might rest on the basic fact that persons work to achieve given ends. To the extent that happenstance or the uncontrollable actions of others can frustrate those ends, people will lose control over their own lives. If accidents frequently destroy their efforts, they may cease to work as productively. The law, therefore, arguably should honor any expectation or holding.

Some observers link this protection-of-expectation function with the preservation of order. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 789 (1985) (arguing that disorder would result if one had little incentive to "accept the imposed distributional system").

Judges practicing this model of private law might justify it this way: "Whatever our obligations might be when strong normative argument shows that status quo holdings are not justified, when such arguments are absent we do no harm—other than consuming some administrative costs—when we replicate and protect the status quo. Further, we even do some good in the process, for to be human is to wish to form plans and to carry them through. We are an organ of the community, and it is our rightful task to honor the claims of individuals based on community norms, at least so long as we do not in the process violate independent normative imperatives or disrupt the community itself. Thus, unless we have reason to suspect that some groups unjustifiably are imposing the costs of their plans on some other group, our mission is to make it possible for people to *have* plans and to carry them through in the only world that they know."

⁹⁸ Of the multitude of available arguments, one could argue that not all status quo holdings are justifiable or protected by Hohfeldian rights, see Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975, or that a judge's proper task is to apply proper principles regardless of the impact on the status quo, or that there are so many interests within the status quo that a mandate to "preserve" them would be indeterminate.

⁹⁹ Mashaw writes:

“operative notion of corrective justice[] is the specific culture within which the events giving rise to claims of right occur.”¹⁰⁰ One could imagine a court seeing in our culture an imperative to secure to persons the benefits they create¹⁰¹ and perceiving in that security a preservation of existing balance.

That the status quo corrective justice model anticipates that courts will protect the status quo ante by using community norms suggests that courts may be willing to protect expectations and interests simply because they exist. A reasoned or unreasoned respect for current holdings—which I speculated played a role in the status quo corrective justice notion—actually may animate some court decisions.

The plausibility of the status quo corrective justice model in turn suggests several useful avenues for critics of the new intellectual property developments. Critics might suggest to the courts reasons not to grant automatic deference to existing holdings.¹⁰² They might point

The individualist model presumes a social order that is autonomous and relatively stable. The law derives its norms from the culture and applies authority (or vindicates rights) in order to reestablish the social equilibrium that has been disturbed. Moreover, this intervention to reconstruct the status quo ante exhausts the state's role in shaping the social world.

Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 Yale L.J. 1129, 1157 (1983). Mashaw goes on to discuss a competing model of adjudication.

¹⁰⁰ Id. at 1156. Whether and how to include community perception and values in law is very controversial. See, e.g., Ronald Dworkin, Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986 (1966). The fact that community values and perception *are* included is less so. For example, Bruce Ackerman has shown that “ordinary” conceptions of property drawn from the lay community sometimes have proved quite influential in adjudication. See Bruce A. Ackerman, Private Property and the Constitution 97-110, 129-45 (1977); see also Lloyd L. Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harv. L. Rev. 1137, 1161 (1990) (approving copyright law's use of a fair use limitation that is responsive to “the community's established practices and understandings”).

¹⁰¹ See, e.g., Weinreb, *supra* note 100, at 1145-46 (noting that the community perceives “a value that is tied to the creator's claim as creator,” despite the existence of countervailing values, such as the dissemination of information).

¹⁰² In formal terms, some holdings are protected not by “rights” against private interference, but by “privileges.” Although the state will not impose duties that are inconsistent with privileges, private parties are free to interfere with privileged activities. See Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays 41-43 (Walter W. Cook ed., 1923); Singer, *supra* note 98.

An exponent of the status quo corrective justice position might try to explain away the existence of holdings unprotected by rights by arguing that all holdings *would* be protected by rights if there were no fear that disruption would result and that where fear of disruption is absent, the law should protect all holdings against private disruption. Even if one accepts the disruption thesis—and even if one concedes that the new intellectual property creates no new disruptions—such an argument remains problematic. Among other things, much of our law is

out the difficulties of using community norms in law.¹⁰³ They might show that the “responsibility follows causation” norm is not the only relevant norm and that many community moral beliefs run in the opposite direction,¹⁰⁴ as do many community practices.¹⁰⁵ They might demonstrate some of the conceptual difficulties with causation by arguing that the image of atomistic individualism inherent in some of the causation literature is fundamentally misplaced or by suggesting that necessarily complex notions such as “wrongfulness” and “merit” better measure responsibility than does causation. Some of these criticisms might persuade courts against use of the primitive corrective justice notion altogether. Other criticisms, such as pointing out inconsistent community norms or suggesting that the new intellectual property protection is itself disruptive on some occasions, may help courts to limit it.

At bottom, however, if this community-based impulse motivates the creation of new rights in intangibles, there may be little that observers can do to stem the tide except to wait for the community to become restive in the opposite direction. This unfortunately may be a long wait as the community may never recognize the loss of new works chilled by the misappropriation explosion.

built on a deference to private choice, and many of the holdings that evolve from private arrangements merely are tolerated, rather than affirmatively justified on their own merits. To speak of protecting *all* holdings disregards this distinction.

Thus, even if one accepts that the current distribution of holdings is nonwrongful—itsself a controversial proposition—the nonwrongfulness may stem merely from the legal system’s reluctance to intervene in individuals’ consensual dealings. If the desirability of *nonintervention* by the legal system allows some holdings to exist, premising new forms of legal interventionism on the desirability of protecting them should be somewhat difficult. Patterns that result from more deliberate choices about the substantive justice of individual holdings might better deserve protection of the kind we describe. Cf. Nozick, *supra* note 75, at 155-60 (discussing “patterned” versus “nonpatterned” conceptions of distributive justice).

¹⁰³ See, e.g., Dworkin, *supra* note 100.

¹⁰⁴ See, e.g., Benjamin Kaplan, *An Unhurried View of Copyright 2* (1967). As Lloyd Weinreb recently has argued, that creators have a special claim to reward is part of our community attitudes, but so are many other values that, depending on context, may weigh *against* recognizing that claim. Weinreb, *supra* note 100. Thus, Weinreb suggests that although “[m]ost of us . . . are likely to perceive . . . a value that is tied to the creator’s claim as creator,” *id.* at 1145-46, this is only one of many community values that may prove relevant; see *id.* at 1140, 1152-53, 1158, 1160-61.

¹⁰⁵ Weinreb has examined certain community practices that would weigh against imposing a no-copy duty in several contexts. See Weinreb, *supra* note 100, at 1150-53.

C. *A Second Model: Value Is Property*

A judicial self-conception that seeks to preserve the status quo does not necessarily evidence adoption of the causation model or use of community notions of responsibility. Something even less reasoned may be occurring. Several critics—the most famous of whom is Felix Cohen—have observed the following logic operating in many decisions: X has “created a thing of value; a thing of value is property; X, the creator of property, is entitled to protection against third parties who seek to deprive him of his property.”¹⁰⁶

Justice Oliver Wendell Holmes apparently thought this logic was animating his brethren in *International News Service v. Associated Press*¹⁰⁷ (“INS”), the most famous reap/sow case of our century. In *INS*, the defendant was a news service that had copied its competitor’s news from, inter alia, public sources. The majority viewed the copying as an actionable attempt to “reap where it had not sown.”¹⁰⁸ Ruling that the news was “quasi-property” as between competing news services, the Court enjoined the defendant from copying its competitor’s news from public bulletin boards and early newspaper editions.¹⁰⁹ Arguing that this aspect of the opinion went too far, Justice Holmes implied that his brethren were wrong in ignoring that “[p]roperty, a creation of law, does not arise from value, although exchangeable”—that the presence of exchangeable value is “a matter of fact”¹¹⁰ rather than law, a matter of “is” rather than “ought.”

If a notion that property automatically arises from value motivates the courts, there is so little reason in it that response is difficult.¹¹¹ There is a fundamental mistake in moving automatically from “is”—exchangeable value—to “ought”—legal protection—and if the courts have a reasoned basis for moving from “is” to “ought,” they should specify that basis so it can be examined. For example, if the unspoken reason for protecting “value” as “property” is that the courts see the

¹⁰⁶ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 815 (1935). Rochelle Dreyfuss captures an analogous argument in what she identifies as the “if value, then right” notion. See Dreyfuss, *supra* note 63, at 405.

¹⁰⁷ 248 U.S. 215 (1918).

¹⁰⁸ *Id.* at 239.

¹⁰⁹ *Id.* at 236.

¹¹⁰ *Id.* at 246 (Holmes, J., concurring).

¹¹¹ David Lange calls this property/value notion “nonsense” and finds its logic to be a massive exercise in question-begging. Lange, *supra* note 10, at 160.

two as the same, then this conceptual error can be clarified and rectified. If the unspoken reason is to protect social cohesion by protecting expectations, then one can point out the circularity of such reasoning, as courts often create expectations. If the courts believe they must protect all existing value in order to ensure productivity, one can point out that only sometimes will granting legal rights increase the amount of value in the world. Further, paralysis, rather than increase in social wealth, more likely will result from granting rights against any change that may cause harm to someone. Or if the leap from "value" to "property" rests on a conception of the judicial role such as the one Mashaw describes,¹¹² that conception can be criticized, or dismantled on its own terms as not leading to these results.¹¹³

Further, one might argue that the distribution of value the courts seek to protect largely is created by the courts themselves; in the absence of legal protection, competition quickly would transfer that value to the public.¹¹⁴ Or one might make the related point that even courts seeking to protect "value" must have some criterion by which to choose the point in a dynamic process at which the "value" that

¹¹² See *supra* notes 97-100 and accompanying text.

¹¹³ Among other things, giving property status to all value can lead to the ultimate disruption of a community—paralysis.

¹¹⁴ One could argue that the value/property approach is circular because the monetary value of an intangible in a competitive situation depends upon legal protection. This argument might run as follows: placing a famous face or trademark on T-shirts makes them more desirable than T-shirts bearing less trendy designs. If everyone can copy the face or mark without paying license fees for doing so, the marginal cost of copying will consist solely of the cost of the physical paint or dye process needed to affix the image; no costs will be attributable to the image itself. Price in a perfectly competitive market will equal marginal cost and long-run average cost. Because the copyist's average and marginal cost attributable to the famous face or mark is zero, none of the price will include payment for the face or mark. Its value to any given seller is then zero.

Note, however, that this argument involves overstatement. In real-world markets the ability to be first with a new face or mark, or even to be second or third, usually will result in lead-time advantages before others enter, and significant profits may be made before new entrants drive price down to the point where it equals marginal cost.

Felix Cohen first noted the circularity of the value/property approach. He argued that the "property from value" reasoning "purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected." Cohen, *supra* note 106, at 815. (By "economic value" Cohen presumably meant merely the monetary value of the sales device to a producer.) For suggestions similar to Cohen's, see Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 *Ga. L. Rev.* 429, 448 (1978)

then exists should be frozen and given property status. At bottom, however, the perception that “value is property” likely will not yield any usable limits.

D. Toward a Third Approach: Modifying the Corrective Justice Model

The conception of the judicial role described in the prior models is, of course, no more than a partial account of what some judges may do sometimes. A third way to approach reap/sow draws on a broader conception: whatever the role played by community norms per se, judges also aim to achieve a result consistent both with their own sense of justice and with precedent, sources that inform—and are informed by—the community. Taking that approach, it is appropriate to examine how the initial corrective justice model of causal maximalism might be modified by taking into account notions of justice drawn from both intuition and case law. In short, this section will investigate what happens when the primitive corrective justice model, which largely sought to use liability rules to link effects to their causes,¹¹⁵ is modified by norms taken from these sources that are informed by, but not dictated by, the community.

The primitive corrective justice model had several primary flaws: it lacked a plausible specification of wrongfulness; it posited a relation between causation and reward that did not comport with usual notions of desert; and it led to results inconsistent with most notions of social good.¹¹⁶ A version of corrective justice more appealing to our intuitions can be developed by taking seriously the frequent references to “unjust enrichment” in intellectual property case law.¹¹⁷

(“advertising value” is based on “the law which artificially creates a scarcity by giving the individual a property right in its use”); Lange, *supra* note 10, at 160.

Rochelle Dreyfuss makes a similar observation, but draws from it a somewhat different and interesting point: when the competition value of the intangible is competed away, the public, rather than the competitor, benefits. Dreyfuss, *supra* note 63, at 407. Dreyfuss’ point is an apt supplement to Cohen’s. One problem with the legal protection of “sales devices” is that sales protection seems unnecessary to preserve or promote value—celebrities will seek fame even if they are not able to sue those who put their faces on T-shirts. All that legal protection does is affect the *distribution* of that value, and that distribution is not a robust fact of economic life but rather is (as Cohen suggested) a product of deliberate legal action.

¹¹⁵ See *supra* notes 86-94 and accompanying text.

¹¹⁶ See *supra* notes 26-43, 95-105 and accompanying text.

¹¹⁷ See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (*dicta*) (ratifying the use of supposed unjust enrichment principles in support of Ohio’s grant to

Perhaps the courts are analogizing to that area of law most directly concerned with imposing liability on the basis of unjust enrichment—the law of restitution.

Restitution law may offer a cure for one defect in the status quo corrective justice model. Rather than relying on a controversial insistence that all current holdings are *prima facie* justifiable and *prima facie* entitled to protection, advocates of that model instead might begin with a less controversial and more limited position—that an individual has *some* resources that she ordinarily is not compelled to make available to others,¹¹⁸ and that the law ordinarily will protect from others' acts of compulsion.¹¹⁹ They might then assert that both the legal system and independent normative judgments support a laborer's right and privilege to withhold aesthetic, intellectual, or physical labor—in ordinary circumstances—unless payment or other satisfactory inducement is forthcoming. This *prima facie* entitlement not to labor is to that extent a *prima facie* "justified holding," and it means that others have no legal right to compel others' labor. From this proposition it is a short jump—though a jump, nevertheless—to the argument that persons should have no affirmative right to keep the benefits of others' labor. From this it is another jump—albeit a bit longer this time—to the argument that persons who have labored are entitled to use the legal system to obtain payment from others for their use of the benefits the laborers have produced.¹²⁰

What might justify these jumps from a right not to labor to a right to be paid? It is relatively uncontroversial that, barring circumstances giving rise to a special duty, a person ordinarily has and should have a

plaintiff of a right to control the broadcast of his performances); *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 24 (Ill. 1983) (relying upon misappropriation doctrine in holding Dow Jones entitled to bar use of its average as basis for futures contract). The dissent in *Dow Jones* argued that "[t]he majority is swayed by what it sees as 'unjust' enrichment." *Id.* at 93 (Simon, J., dissenting).

¹¹⁸ That is, a Hohfeldian "privilege" or "liberty" to refuse to make the resource available to others. See Hohfeld, *supra* note 102; Gordon, *Inquiry into the Merits*, *supra* note 37, at 1354-61.

¹¹⁹ That is, a Hohfeldian "right" to deny others access to the resource. See Hohfeld, *supra* note 102, at 96-97; Gordon, *Inquiry into the Merits*, *supra* note 37, at 1354-61.

¹²⁰ This conception might be bolstered further by notions of desert—that one who works to create something of benefit deserves some reward for it, at least where the benefit indeed is produced and where she has labored in the expectation of reward. But even principles of desert from labor cannot justify property; they offer perhaps only a qualified justification for property rights. See Munzer, *supra* note 77, at 254-91.

privilege and a right not to labor and that she can trade on this entitlement package to obtain compensation via contract: "I won't work unless you pay me." More controversial is whether a person has or should have a right to control or to be paid for the results of labor without a contract. Can one reach such a right from a privilege not to put one's labor at others' behest?

One possible bridge is restitution, a body of law that sometimes allows claims for payment where work is done and the worker no longer has leverage to obtain payment from the other party (leverage ordinarily provided by her freedom not to work).¹²¹ Perhaps when courts grant rights to those whose investment of labor or of other resources¹²² has produced a performance,¹²³ a stock market index,¹²⁴ a song style,¹²⁵ or a set of news items,¹²⁶ they implicitly draw on restitution to move from a liberty not to work to a right to be paid for work done.¹²⁷

¹²¹ Much of substantive restitution law can be seen through the lens of quasi-contract—in which a court asks whether, given the interactions between the parties, it should treat them as if a contract existed. This viewpoint implies that the plaintiff once owned or otherwise controlled something conferred on the defendant that could have been consideration for an explicit contract.

¹²² The analysis does not change if the resource invested is one other than labor. I use labor because it is one of the entitlements most easily defended. Thus, the analysis does not depend on any distinction among "labor," "creativity," "sweat of the brow," or other types of human effort, or between these and more tangible resources.

¹²³ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (Ohio law).

¹²⁴ *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983) (Illinois law).

¹²⁵ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (California law).

¹²⁶ *INS*, 248 U.S. 215 (pre-*Erie* federal common law).

¹²⁷ Note also that reference to unjust enrichment law is historically appropriate, for its traditions played a strong role in the case most often cited by supporters of the reap/sow principle, *INS*, 248 U.S. 215. See *infra* notes 437-48 and accompanying text for a detailed description of *INS*.

One need not stretch to interpret *INS* or the misappropriation cause of action it created as drawing on unjust enrichment—the reap/sow principle used there is inherently restitutionary, as commentators have noted. See, e.g., Dawson, *supra* note 13, at 1415-16 (interpreting *INS* as a restitution case). The Court's language is itself indicative. The majority opinion found the news to be "quasi-property" between the parties despite the absence of anything that resembled actual property, *INS*, 248 U.S. at 242, much as restitution courts historically have found quasi-contracts to exist where they thought it appropriate to impose liability despite the absence of anything resembling an actual contract. See Restatement (Second) of Restitution § 1 cmt. a (Tent. Draft No. 1, 1983) [hereinafter Restatement (Second) of Restitution]. Though other traditions played a role in the *INS* case as well, the decision often is seen as an application of pure corrective justice principles in which notions of unjust enrichment dominate. See Dawson, *supra* note 13, at 1415-16; Mashaw, *supra* note 99, at 1159-60 (noting

Useful models for addressing issues in the law of intellectual products might be sought, therefore, in the law of unjust enrichment. There, the courts have dealt with persons who have conferred on others labor, money, or other resources that they were not obliged to confer, somewhat as intellectual property producers choose to send their works into the world without promise of return. Identifying the norms that courts utilize to handle these claims provides some hints as to how to accommodate the claims of both users and producers of the intellectual product, as against each other and as they affect third parties. Moreover, reminding the courts of the ways that unjust enrichment law is constrained may help them find routes to appropriate constraints for the reap/sow impulse. As it is now, the courts tend to use restitution too readily and inaccurately.

For example, the Supreme Court in dicta has defended state intellectual property law by pointing to an "unjust enrichment" rationale. The Court suggested that it can be a sufficient basis for requiring payment that the defendant had the use of "some aspect of the plaintiff" that had "market value" and for which the defendant normally would pay.¹²⁸ As will be explored below, however, that reflects only a tiny portion of the requirements imposed by restitution law. At a minimum, the plaintiff suing for payment for benefits rendered without the defendant's request has to have a good reason for bypassing the market, and the defendant's autonomy must be protected.¹²⁹

that the case raised societal issues not adequately accommodated by the majority's corrective justice orientation).

The link between intellectual property and restitution has been made in other contexts as well. See, e.g., *Zacchini*, 433 U.S. at 576 (dicta) (linking the right of publicity to an unjust enrichment rationale); Robert C. Dencola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum. L. Rev. 516, 519-20, 528, 530 (1981) (suggesting that the "act of aggregating isolated pieces of information" should be grounds for copyright protection, in part because of considerations of "natural right to the fruits of one's labor" and unjust enrichment); see also Gordon, Inquiry into the Merits, supra note 37, at 1454-60 (comparing copyright and restitution principles).

¹²⁸ See *Zacchini*, 433 U.S. at 576 (dicta) (quoting Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Probs. 326, 331 (1966)) (ratifying the use of supposed unjust enrichment principles in support of Ohio's grant to plaintiff of a right to control the broadcast of his performances).

¹²⁹ The Article later returns to consider some of these rationales in depth. See infra text accompanying notes 198-245. Recent analysis of restitutionary arguments in the area of attorneys' fees similarly focuses on the many preconditions that attach to restitution. See Charles Silver, A Restitutionary Theory of Attorneys' Fees in Class Actions, 76 Cornell L.

The use of restitution doctrine to provide limiting principles in the realm of intellectual property might be criticized, however, to the extent that the providers of unrequested services who prevail in restitution suits and the creators of intellectual products are not situated similarly in the market. Some have argued that the availability of restitution for unrequested services should depend, at least in part, on whether the defendant would have agreed to pay for the services had the parties been able to bargain in advance,¹³⁰ and it is not clear that intellectual product producers often could make such a showing when they demand payment from persons who copy their databases, designs, or inventions.

Some intellectual products would be produced even in the absence of intellectual property rights.¹³¹ For such products there can be no certainty that the defendant's copying of the product would have been the subject of a contractual restriction. Just as one can imagine the producer saying, "I will not make this product available to you unless you promise me that you will pay royalties for any copies you make," one also can imagine the user saying, "I will not buy this product unless you sell it without strings attached." Sometimes the producer would accept the latter condition.¹³² In the real world, it may be impossible to know whether a given work or a given use would have been sold with a royalty promise attached.

Rev. 656, 665 & n.47 (1991). The Silver article, brought to my attention too recently for full integration here, reinforces many of the points made in this Article.

The vigor of the current philosophical debate over whether the receipt of governmental benefits can give rise to duties illustrates the general foolhardiness of imagining that the receipt of any benefit automatically gives rise to a legal or even moral duty. See, e.g., Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 *Ethics* 616 (1982); Nozick, *supra* note 75, at 90-95; John Rawls, *A Theory of Justice* 111-12 (1971); A. John Simmons, *Moral Principles and Political Obligations* 101-42 (1979). Much of the debate, built around Rawls' fairness principle, centers on the role of the recipients—whether they are passive or active, whether they are engaged in a common enterprise, etc. These considerations arguably have equivalents in restitution law. See *infra* notes 198-284 and accompanying text.

¹³⁰ Robert A. Long, Jr., Note, *A Theory of Hypothetical Contract*, 94 *Yale L.J.* 415 (1984).

¹³¹ See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *Harv. L. Rev.* 281, 282-83 (1970); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 *Hamline L. Rev.* 261, 287-300 (1989).

¹³² If such imaginary bargaining sessions were possible, the no-strings condition might be accepted even if intellectual property rights existed; the same user who refused to promise royalties in a world without intellectual property rights could, in a regime that granted such rights, refuse to purchase the tangible product unless the producer waived his entitlement to royalties.

But this indeterminacy should not be fatal. In fact, it is difficult to know why any emphasis should be placed on the question of whether, in a hypothetical world where only contract existed to restrain copying, a person would consent to pay royalties or to refrain from copying as part of the price of obtaining access to a given intangible.¹³³ Whether a given creator can fence off her product to gain the leverage that will allow her to demand payment or promises usually depends on serendipitous circumstances—for example, whether her product and its mode of production can be easily concealed, or whether the product is otherwise difficult to duplicate.¹³⁴ Consent is meaningful as a normative category only when the background pattern of entitlements—the pattern of available leverage—is normatively acceptable.¹³⁵ Aside from transaction cost considerations,¹³⁶ ability to fence in a hypothetical world contains little of normative significance for the treatment of intellectual products.¹³⁷

From a normative perspective, a more useful way to pose the issue is whether a potential defendant has any good reason to complain if required to pay for his use of the plaintiff's creation. In a world without prohibitions on copying, the defendant might be lucky enough to obtain access to the good for free or upon payment of the modest price intended only for noncopyist end-users, but that is not a good

¹³³ Even a commentator who urges that restitution's treatment of unsolicited benefits *should* be seen through the lens of a hypothetical bargain admits that "courts frequently impose quasi-contractual liability without considering the actual or hypothetical intentions of the parties." Long, *supra* note 130, at 415 n.3; see also 1 Arthur L. Corbin, *Corbin on Contracts* § 19, at 48-49 (1963) (citing public welfare as grounds for the existence of an enforceable duty "without regard to assent or dissent").

¹³⁴ Gordon, *Inquiry into the Merits*, *supra* note 37, at 1465-68.

¹³⁵ In his comment on my Article, Professor Kitch implicitly argues that all such entitlement issues can be sidestepped by utilizing the tort of "interference with contract," which would, he argues, render the question of actual physical leverage irrelevant. Edmund W. Kitch, *Intellectual Property and the Common Law*, 78 Va. L. Rev. 293 (1992). This contractarian analysis, however, merely shifts the entitlement question to another level. One still would need to ask which contracts between authors and publishers or between inventors and manufacturers are so normatively desirable that their preservation justifies interference with the liberty of third parties. See Gordon, *Inquiry into the Merits*, *supra* note 37, at 1425-35 (discussing consent as a criterion for moral adequacy).

¹³⁶ Costs of enforcement are only one component of the economic equation. Providing legal anticopying rules to supplement an incomplete set of physical fences may be expensive, but in the long run the rules may encourage more production than they cost.

¹³⁷ See Gordon, *Inquiry into the Merits*, *supra* note 37, at 1465-69.

reason for complaint unless one is willing—as I am *not*—to raise non-moral luck to the level of a justifiable basis for entitlement.

There is no reason to give users a baseline entitlement to whatever they could have obtained in a world without legal protection for intellectual products. To the contrary: Consider person *X*, who intentionally has created something for which she wishes to be paid. Consider person *Y*, who deliberately uses the product, knowing the conditions under which it was made. In my view, as long as *Y* benefits from the investments of *X* in an amount greater than the amount *X* demands in return,¹³⁸ and as long as no issues are implicated *except* payment, *Y* has little ground for complaint if payment is extracted.¹³⁹ As earlier stipulated,¹⁴⁰ *Y* has no entitlement to *X*'s labor resources, and as between *X* and *Y*, *X*'s claim to the *yield* of those resources appears to be marginally stronger.¹⁴¹ This much, at least, I concede to the "corrective justice" exponents.¹⁴² Once that is conceded, one must reject the position that the public has a baseline entitlement to whatever goods and prices it could have obtained in a world lacking noncontractual legal restraints on copying.¹⁴³ At most they have a baseline entitlement to be as well off as they would have been had the creators' efforts—and the creators' assertions of right—not existed.

Yet, even if one treats as nonessential the inquiry into the defendant's *ex ante* willingness to pay for the plaintiff's efforts, giving the creator a marginally stronger claim than the user may not avail the creator much. Payment, a mere shift in wealth, is *not* the only issue

¹³⁸ This condition assumes there is a *fungibility* in what *X* gains (e.g., money) and what *X* demands in exchange (e.g., money again).

¹³⁹ This is equivalent to my arguing that the entitlement pattern against which a *legitimate* pattern of contract can emerge is a pattern that (1) includes some baseline entitlement, however weak and conditional, to the yield of one's effort, and (2) does not grant an entitlement to products of others' efforts simply because they are accessible. See Gordon, *Inquiry into the Merits*, *supra* note 37, at 1446-65 (discussing baselines and distributional principles). For an examination of Locke's treatment of this issue, see Gordon, *Equality*, *supra* note 64, at 114-23 (arguing that strangers have "no right" to "others' pains").

¹⁴⁰ See *supra* notes 118-21 and accompanying text.

¹⁴¹ Of course, when *Y* makes *creative* use of *X*'s work, the yield is a joint product of the efforts of both *X* and *Y*. My argument in favor of *Y*'s duty to pay applies most easily to cases of pure copying ("piracy," if you will) where a defendant adds nothing to *X*'s work.

¹⁴² See *supra* notes 78-83 and accompanying text.

¹⁴³ See Gordon, *Inquiry into the Merits*, *supra* note 37, at 1435-59 (discussing baseline entitlements). The result would be the same even if one shifted the burden of persuasion so that creative persons were asked if *they* had any good reason to complain if all weight were denied to their moral claims to payment. See *id.* at 1430-35, 1446-59.

implicated when the law imposes restraints on free riding. Almost invariably, free riding serves or disservices other important values, and these can outweigh the producer's weak claim to payment¹⁴⁴ or give it strength.¹⁴⁵ Specifying and weighing these additional values, and identifying modes of implementing them, consistent where possible with the corrective justice impulse, become the more important questions.

This brings us back to our starting point: we need to define the conditions under which a lack of payment for benefits gained should be deemed an "unjust" enrichment.¹⁴⁶ The restitution approach might be interpreted as asking whether the beneficiary has benefited from the use of something that the plaintiff could have used as consideration—any liberty, any entitlement—and as defining circumstances in which imposing an obligation of payment is appropriate,¹⁴⁷ either because those factors that *reinforce* a reap/sow claim are present, or because those factors that *contradict* its force are absent. Thus, the concerns found in the restitution cases—such as a reluctance to undermine the market and a desire to protect the defendant's autonomy¹⁴⁸—reenter as essential, for they may combine to yield useful information as to what limitations are needed to render a court-imposed right to payment for benefits acceptable.

Restitution doctrine also may help to refine our intuitions on other points. Earlier, I suggested that free riding is not itself wrongful,¹⁴⁹ yet I have just suggested that some free riders should have an obligation of payment.¹⁵⁰ Restitution doctrine offers a way out of this seeming paradox, for it makes clear that an obligation of payment can be imposed fairly even when the defendant has done nothing wrong-

¹⁴⁴ See supra notes 65-71 and accompanying text (discussing the paralysis and injustice that would ensue if all free riding were forbidden in our society).

¹⁴⁵ See supra notes 34-37 and accompanying text (discussing the incentive purposes served by granting anticopying rights to creative persons).

¹⁴⁶ Thus, it has been suggested that the "three essential elements of quasi-contract" include "1. a benefit conferred; 2. appreciation by the recipient of such benefit; and 3. acceptance and retention of such benefit under such circumstances that it would be inequitable to allow retention of the benefit without requiring payment for it." 1 Corbin, supra note 133, § 19, at 49 (Supp. 1991).

¹⁴⁷ I am indebted to Allan Axelrod for this formulation.

¹⁴⁸ See infra Part II.

¹⁴⁹ See supra notes 65-71 and accompanying text.

¹⁵⁰ See supra text accompanying 138-42.

ful.¹⁵¹ The formerly unconscious patient who was assisted in an emergency acts wrongfully only when he later refuses to pay the doctor: allowing the ministrations while he was unconscious hardly could be considered wrongful. Thus, the restitution approach does not presume that a copyist has behaved wrongfully in the usual sense. Rather, corrective justice is triggered by something similar to what Jules Coleman calls a "taking"—the copyist has the benefit of "what another has a legitimate right to" and has not yet "render[ed] adequate compensation" for it.¹⁵² The wrong, if any, lies in the lack of payment, not in the transferring or sharing of the resource.

In the cases with which we will deal, the interaction between creator and creative copyist often will be a positive-sum game, yielding enough in the way of profit that the creator (plaintiff) can be rewarded and the copyist (defendant) still can come out of the transaction with a net gain. This configuration yields a very different set of normative pressures than those presented by the typical tort cases involving accidents and other negative interactions. In the latter types of cases, a court usually has only one unpleasant task: to decide on whom the harm should lie, plaintiff or defendant. Here *no* harm need be done, and there is correspondingly less need to find a culpable "wrong" to justify the court's intervention.

Restitution also may aid us with finding a means to reduce the overbreadth of a pure causation test. It would be disproportionate to give a creative laborer payment for all valuable things, however beneficial, that might make some use, however slight, of her contribution; for her to have a more plausible claim to deserve reward, ideally she should be able to show some kind of special connection, or nexus, between herself and the particular person to be charged. In tort law, the need for such a connection usually is addressed by asking whether

¹⁵¹ See *infra* notes 193-97 and accompanying text.

¹⁵² Coleman, *supra* note 85, at 427 (arguing that even justified and nonwrongful "takings" are embraced by the corrective justice principle). Note that I have adapted Coleman's language to my purposes. He refers to one person's "taking" another's entitlement, whereas I refer to having "the benefit of" such an entitlement.

Restitution embraces such nonwrong-based obligations of payment. See, e.g., Restatement of Restitution, Quasi Contracts and Constructive Trusts § 63 cmt. a (1937) [hereinafter Restatement of Restitution]; *infra* note 191 (discussing expense-to-plaintiff requirement); *infra* note 193 (suggesting restitution is due for entirely "innocent" behavior); *infra* note 222 (contrasting unjust enrichment by subtraction from plaintiff and enrichment by wrong to plaintiff).

the defendant was “foreseeable”; in restitution, the need for such a connection usually is addressed by asking if the defendant’s benefit came “at the expense of” the plaintiff.¹⁵³

In ordinary cases involving labor, the plaintiff often has rendered services for a particular defendant, and the expenditure of effort is an expense clearly attributable to a particular person’s benefit. In the intellectual product context, by contrast, it is possible that the labor would have been invested and the work produced without expectation of payment from a particular defendant. If so, the plaintiff will find it hard to argue against any one defendant: “Your benefit is at my expense; I would not have labored but for the expectation of payment from you.”

Yet, once again, the difficulty of identifying the intended recipient of intellectual products need not undermine the applicability of restitution theories to intellectual property. An alternative to identifying the recipient is identifying the likely range of uses. If the defendant’s use is within the plausible range of uses for which the plaintiff could have contemplated receiving payment, then a plaintiff might be able to argue that it is at least *possible* that the expectation of that person’s contribution induced her to labor, and thus that lack of payment from the defendant could leave her with something less than she would have had in the defendant’s absence. Indeed, I later argue that an intellectual property defendant must be at least a person from whom the creator plausibly might have sought payment *ab initio*.¹⁵⁴

¹⁵³ Restitution is required only when the defendant “has been unjustly enriched at the expense of another.” Restatement of Restitution, *supra* note 152, § 1; see 1 Corbin, *supra* note 133, § 19A, at 64 (Supp. 1991) (“detriment to plaintiff” said to be crucial to quasi-contract). The requirement may be satisfied, however, by showing a nonharmful violation of a “legally protected interest.” 1 George E. Palmer, *The Law of Restitution* § 2.10, at 133 (1978).

This Article later suggests two possible ways of satisfying the requirement of an “expense to plaintiff”: (1) limiting the range of defendants to persons whose payment formed, at least arguably, part of the plaintiff’s reason for laboring, or, more practicably, (2) limiting the right of reward to those occasions when a defendant uses the intangible created by the plaintiff’s labor in a way that competes with the plaintiff and that thus may deprive the plaintiff of the rewards toward which she had labored. See *infra* notes 336-61 and accompanying text.

¹⁵⁴ See *infra* notes 336-61 and accompanying text. Thus, I argue that it is important that the plaintiff prove it is foreseeable that this defendant could be within the range of the plaintiff’s customers, or that this defendant intends to sell to such customers. I make this argument not because I agree that the copyist is entitled to whatever he could be lucky enough to get in a world without intellectual property law or restitutionary rights—that is a position I have rejected both here and elsewhere. See Gordon, *Inquiry into the Merits*, *supra* note 37, at 1446-65; *supra* notes 138-43 and accompanying text. Rather, I take this stance because a

This particular restriction on the range of defendants does not follow mandatorily from the ambiguous expense-to-plaintiff requirement of restitution law.¹⁵⁵ That vague requirement can be interpreted as no more than a requirement of nexus—of connection between the plaintiff and the benefit reaped¹⁵⁶—a requirement that is easily manipulable. More fundamental than the ambiguities of the “expense” requirement are arguments of fairness. It does not seem fair to give a creator, whose claims of merit or reward are based on what she *did*, a reward based on something she could not have contemplated at the time of creation. Ordinary notions of desert and cause do not extend so far.¹⁵⁷

Claims of deserving reward do not exist “in the air” any more than claims of wrongfulness do. The scope of merit or wrongfulness must be determined by referring back, *inter alia*, to the nature of the acts characterized as meritorious or wrongful. Plaintiff’s entitlements should not extend to all remote benefits for whose existence her actions were a necessary condition—such an extensive reward hardly would be proportional to the reward deserved.¹⁵⁸ The strongest claim

creator’s desert claim is strongest when addressed to those benefits that she could foresee. In short, the limitation is plaintiff-based rather than defendant-based in its rationale.

¹⁵⁵ The expense-to-plaintiff requirement is discussed further *infra* notes 180-81, 191, 220-25 and accompanying text, and is applied to intellectual product fact patterns *infra* text accompanying notes 336-79.

¹⁵⁶ See 1 Palmer, *supra* note 153, § 2.10, at 134.

¹⁵⁷ But see Becker, *supra* note 76, at 48-56 (arguing hypothetically that some property rights may arise). Becker’s analysis suggests that property can follow if, *inter alia*, it is a reward proportional to the value added by the laborer’s efforts. Deciding how much “value” to attribute to the initial creation, and how much to its later and potentially unexpected uses and adaptations, however, is a normative as well as an empirical question. In addition, the prospect of receiving unforeseeable rewards likely will not have much incentive effect. *Id.* at 53-56.

¹⁵⁸ Thus, Robert Rabin suggests that “[t]he Anglo-American judicial tradition maintains a deep abhorrence to the notion of disproportionate penalties for wrongful behavior.” Rabin, *supra* note 95, at 1534. I would suggest that the “notion of disproportionality evoked by an interpersonal corrective justice perspective,” *id.* at 1538, also should limit the rewards one might claim for meritorious behavior. Cf. Becker, *supra* note 76, at 52-53 (proportionality linked to the value produced by the labor).

One judge speculated that even a fraudulent user of another’s property might receive the protection of some proportionality considerations. *Janigan v. Taylor*, 344 F.2d 781, 787 (1st Cir.) (Aldrich, C.J.) (*dicta*) (“If an artist acquired paints by fraud and used them in producing a valuable portrait we would not suggest that the defrauded party would be entitled to the portrait, or to the proceeds of its sale.”), cert. denied, 382 U.S. 879 (1965). Following Judge Bailey Aldrich’s example, Professor Dobbs has suggested that there may be occasions when “the defendant’s own efforts or property played such an enormous part in the profits that it

of desert would seem to exist where intent conjoins with achievement. If a defendant's use is so creative as to be outside the range of uses contemplated by the creator, then the creator does not have even a marginally stronger claim to the yield than does the defendant.¹⁵⁹

Several ways of addressing this concern, other than a mechanical repetition of the ambiguous expense-to-plaintiff formula, may exist. As Justice Benjamin Cardozo linked a negligence defendant's liability to the risks he foreseeably created,¹⁶⁰ perhaps a misappropriation plaintiff's range of claims for reward should be limited to the scope of the benefits she foreseeably created. Thus, one might ask whether a defendant copied a product for a purpose that was within the plaintiff's contemplation at the time of creation.

In tort law, Ernest Weinrib suggests that the foreseeability requirement is independently required by the immanent rationality of tort law itself; for negligence law to be coherent, a plaintiff's claim must be based on carelessness foreseeably directed toward her.¹⁶¹ An analogous argument can be made for limiting recovery for benefits generated: a defendant's liability for copying should be based on benefits the plaintiff had foreseeably directed to the very audience that the allegedly infringing copies will serve.¹⁶²

The reap/sow notion itself may be limited in this way. In the Supreme Court's articulation, one behaves wrongfully if one who has not sown reaps another's harvest.¹⁶³ The remote beneficiary who makes an unexpected and creative use of the work arguably does not

becomes unfair to force disgorgement." Dan B. Dobbs, *Handbook on the Law of Remedies* 433 (1973).

¹⁵⁹ Cf. *supra* notes 138-42 and accompanying text (creator's corrective justice claim dependent on a form of intentionality).

¹⁶⁰ See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

¹⁶¹ See Weinrib, *Causation*, *supra* note 81, at 438-44 (defending Cardozo's approach in *Palsgraf* as essential to a proper understanding of tort liability).

¹⁶² This includes cases where the copyist himself is a foreseeable beneficiary, for example, a company that makes many copies of a newsletter for which it purchases but a single subscription.

¹⁶³ *INS*, 248 U.S. at 237-40. Even Locke's labor theory might be read in a manner consistent with the view that the prohibition on "reaping without sowing" depends on the laborer's being deprived of something she would have possessed absent the defendant's intervention. See *infra* notes 236-42 and accompanying text.

reap the plaintiff's harvest. At most, she gleans in a neglected corner of the field, and by gleaning Ruth met Boaz.¹⁶⁴

Note that a recommendation to use foreseeability or similar concepts to limit the range of potential defendants suggests that a right to reward cannot generate property rights. A right to exclude is at the center of any property right,¹⁶⁵ but to give the creator a prima facie right to exclude at whim would threaten to sever a defendant's liability from considerations of whether the plaintiff deserves a cause of action. Foreseeability, proportionality, or merit could be irrelevant to determining the producer's claim of entitlement.¹⁶⁶ These notions, combined with the expense-to-plaintiff requirement and other aspects of restitution law, work against granting "property" and its right to exclude solely on the basis that one has expended labor that creates benefits for others.¹⁶⁷

Thus, although the modified corrective justice approach may support giving a laborer a right to recover, it does not give "property." Natural law approaches to intellectual property, by contrast, tend to move quickly and controversially from "labor" to "reward" to "property."¹⁶⁸ But property is not the only possible form of reward.¹⁶⁹ The same reasons that persuade against a "property" treatment lead to a

¹⁶⁴ Gleaning not only was an accepted practice in the Biblical scheme, but it also provided the context in which two crucial ancestors of King David met. Ruth 2:2-23.

¹⁶⁵ See, e.g., Morris Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 12 (1928).

¹⁶⁶ Note that I use considerations ordinarily applicable to limiting a defendant's responsibility in tort (e.g., causation, remoteness, lack of wrongfulness) to limit a plaintiff's claim. Although torts and restitution are different areas of law, each expresses corrective justice notions; thus, for these purposes it does not seem inappropriate to draw on the insights of both fields.

¹⁶⁷ I argue elsewhere that Locke's proviso causes his labor theory of property to yield a similarly limited result as applied to most of the new intellectual property developments. See Gordon, Equality, supra note 64, at 19-24.

¹⁶⁸ See Spooner, supra note 73, at 21-28.

¹⁶⁹ For example, restitution law may support some "reward." The form of reward it gives for labor is limited to monetary payment, but against a nonwrongful defendant the amount of that payment generally is "limited . . . to its value in advancing the purposes of the recipient." Restatement of Restitution, supra note 152, § 155, at 611 (emphasis added); see also id. § 40 cmt. a, at 155 (discussing limit on restitution for services rendered); Dobbs, supra note 158, at 262 (applying subjective measure of value to nonwrongdoing defendant in the land context).

Sometimes the market value of services is awarded. See Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907); Dobbs, supra note 158, at 264-65. Even where the purpose of a recovery "is to measure the benefit to the defendant . . . any given benefit may be capable of being measured in different ways." Id. at 260.

suggestion for mode of recovery:¹⁷⁰ injunctions should not be granted automatically to restrain persons' uses of the products of others' labor.¹⁷¹

Restitution also may help to address another possible flaw in the intellectual property producer's causally based claim to reward, namely, that it would lead to overbroad application and threatened social paralysis. Both restitution and a more sophisticated approach to corrective justice would suggest, by contrast, that the laborer's claim to reward is *weak*, being both conditional and fairly easily outweighed. The case law showing the many limitations on a volunteer's ability to prevail illustrates this weakness; the following may help to explain it.

¹⁷⁰ Restitution is capable of providing property-like remedies (e.g., constructive trusts, tracing, orders for the return of specific goods), but it does so only when the defendant has violated a preexisting property right or otherwise has behaved wrongfully. A classic example of such a "wrong" is when the beneficiary of a will murders the testator; he usually will find the inheritance stripped from him by a constructive trust. As for the existence of a preexisting entitlement, the schemes we are investigating assume that the laborer has as a preexisting entitlement only his entitlement not to labor. That entitlement falls far short of a full property right. For reasons why creating a property right in the benefits one's labor produces would be inappropriate, see *infra* notes 362-76 and accompanying text. As for other forms of "wrongful behavior," free riding is not per se wrongful; as Justice Benjamin Kaplan notes, "if man has any 'natural' rights, not the least must be a right to imitate his fellows . . . [P]rogress' . . . depends on generous indulgence of copying." Kaplan, *supra* note 104, at 2; see *supra* text following note 65.

¹⁷¹ Injunctive remedies pose dangers of harm to both the defendant and society at large that a right to payment does not pose to the same degree. See, e.g., 2 Goldstein, *supra* note 22, at 277-80 ("The public policy problem raised by injunctions against works that only partially infringe a plaintiff's copyright is that injunctions in these cases can deprive the public of the original elements that the defendant added and that are unavailable from the plaintiff or from others"; also, "some part of the work's value that is attributable to the defendant's independent effort" may be captured by the plaintiff).

More generally, any prohibition on communication may raise more serious issues than a requirement of payment. Thus, in rebuffing a First Amendment challenge to the right of publicity, the Supreme Court stressed that the performer sought only recognition of his "commercial stake," not to enjoin dissemination of his performance. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-74 (1977). Also note that though the absence of an injunctive right may minimize First Amendment problems, it does not eliminate them given that monetary restraints on the use of intellectual products such as news also can threaten First Amendment values.

Similarly, Douglas Laycock suggests that the law now gives plaintiffs equitable remedies "if they want them and if there is no good reason to deny them." Laycock, *supra* note 53, at 689. One of the "good reasons" Laycock gives for denying injunctions is the presence of a "countervailing substantive policy, such as freedom of speech." *Id.* at 742-43. He lists other reasons relevant to intellectual property, such as avoiding hardship to the defendant or to innocent parties, *id.* at 749-50, and deference to more particular law, *id.* at 752-53.

Some intellectual property producers *choose* to send their works into the world without obtaining contracts from all who might wish to copy them; only later do they seek to restrain or to obtain payment for copies made. The corrective justice model suggests that one should take responsibility for one's own actions; if so, this choice arguably should constrain such producers' rights to sue.¹⁷²

In corrective justice at least two variables exist: the change in position effected (the gain or loss) *and* the nature of the acts that give rise to these changes (active or passive). Ernest Weinrib aptly terms the paradigmatic acts in corrective justice "doing" and "suffering."¹⁷³ Where the parties have this doer-sufferer relationship, the case for relief is strongest.¹⁷⁴

Deliberate copying of intangibles created and marketed by others stands on uneasy ground. The plaintiff is a "doer," a chooser, an active party. She has chosen to make the product—the boat, the book, the automobile, the stock market average—available to the public, knowing that she does not have a contract with all the persons who might want to use the product in ways she does not like. One might say she *already* has chosen her "harvest": the profit from the sale or lease of these objects.

But that does not lead immediately to denying the plaintiff's claim because, among other things, the defendant is also a "doer"—he has

¹⁷² Cf. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *Tex. L. Rev.* 35, 41-44 (1981) (arguing that enrichment at the expense of another is not necessarily unjust and therefore not subject to restitution, and noting that sometimes restitution is required when no real enrichment was received).

¹⁷³ See Weinrib, *Legal Formalism*, *supra* note 81, at 978.

¹⁷⁴ This point is evident when comparing tort and restitution. The relationship between "doer" and "sufferer" clearly is present in those tort cases where an active defendant harms a passive plaintiff. In those cases, relief is fairly easily granted. The relationship of "doer" and "sufferer" is virtually reversed, however, in the typical "volunteer" and "intermeddler" cases of restitution law where an active benefactor sues a passive beneficiary. But see Silver, *supra* note 129, at 664-65 (arguing for an extension of restitution theory to encompass "passive" absentee plaintiffs in class action attorney fee collection); Weinrib, *Legal Formalism*, *supra* note 81, at 979 (extending the "doing/suffering" model to certain cases of unjust enrichment).

When someone provides an unrequested service without a good excuse for failing to seek the recipient's advance consent, relief ordinarily will be denied. The restitution literature contains many references to the desirability of preserving the passive defendant's freedom to choose with whom he will deal; protecting his autonomy is a major reason for the general refusal to allow intermeddlers to recover. See, e.g., *Restatement of Restitution*, *supra* note 152, § 2 cmt. a; Edward W. Hope, *Officiousness*, 15 *Cornell L.Q.* 25, 26 (1929-1930); John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 *Vand. L. Rev.* 1183, 1183-84 (1966).

chosen to make a mold of the boat hull design, to copy the book for mass sale, to use the recent improvements in the automobile engine as a model for the car he is designing, or to market a stock market futures contract that makes reference to the famous average. Between two active knowledgeable parties—two “doers”—it is more difficult to say where entitlements should lie. The creator’s efforts appear still to give her a marginally stronger claim than the user’s, but the difference between them is not sharp.

Note the number of issues even this qualified claim to a nonproperty entitlement leaves unresolved.¹⁷⁵ The status quo corrective justice model is concerned solely with two parties: *X* generates a benefit that *Y* uses so *Y* should pay. But requiring *Y* to pay may affect many persons beyond *X* and *Y*. If a model focuses on “cause,” it also should take into account systemic effects that are “caused” beyond the two parties. More broadly, transactional rights should be created only if their effects on systemic and distributional considerations are acceptable.¹⁷⁶ Courts resolving tort or restitution cases have dealt with such transactional claims in a societal context. Their decisions may provide some hints as to how to accommodate a two-party corrective justice claim with the rights or interests of third parties. But such courts are not attuned to the particular difficulties of granting rights in intangibles. Rights over intangibles as diverse as information, typography, or utilitarian designs implicate discrete issues as to different types and uses within each subject-matter class. Restitution law can provide useful suggestions for only a portion of the constraints that should be applied to the reap/sow notion. Nevertheless, the restitutory analogy offers a plausible bridge that completes the corrective justice claim by providing entitlement baselines that make intelligible the concept of copying as a “taking.” It also links correc-

¹⁷⁵ For example, what should be the result when more than one party “produces” the benefits? Does someone who produces \$5 of benefit “deserve” the legal system spending \$20 to capture it? Should someone whose contributions are rendered valueless by a particular organization of society have no right to reward or compensation? That which is beneficial may itself depend on the social structure. See Buchanan, *supra* note 70, at 236-38 (“different cooperative arrangements may demand different skills”).

¹⁷⁶ See Calabresi, *supra* note 43, at 297-308; cf. Munzer, *supra* note 77 (arguing for a pluralist approach to property justification); James W. Nickel, *Justice in Compensation*, 18 *Wm. & Mary L. Rev.* 379, 387-88 (1976) (arguing that distributive and compensatory justice “are not really separate categories” but conceding the difficulty that would be introduced by attempts to classify particular sets as “justified holdings”).

tive justice to other norms and does so in a way that cautions against a too-quick adoption of a "property" model. So let us turn to restitution for the general principles it yields, if any, that are relevant to our problem of an increased judicial willingness to grant intellectual property rights.

The doctrines are to serve not as sources for determinate answers, but heuristically, as sources for themes that may assist in demystifying and limiting the appropriative claim. At a more fundamental level, the inquiry may show that some form of reward for creative effort is consistent with larger patterns in our law, thereby vindicating the core of statutory intellectual property that still is attacked sometimes as an illegitimate privilege.¹⁷⁷

The concerns of courts in the restitution cases are party-oriented and social-welfare-oriented, backward-looking in the manner of substantive corrective justice,¹⁷⁸ and forward-looking in the manner of economic and other social-welfare formulations. The party-oriented concerns are avoidance of harm and preservation of autonomy.¹⁷⁹ The socially oriented concerns involve minimizing administrative costs, preserving a market system, and creating allocative incentives. Taken together, these concerns suggest that there should be sharp limits on the extent to which this core restitutionary impulse should prevail.

II. RESTITUTIONARY THEMES

The central goal of restitution is to prevent "the unjust enrichment of one person at the expense of another."¹⁸⁰ Thus restitution usually is available only where a defendant has been enriched unjustly and at the plaintiff's expense. To fulfill the latter requirement, a restitution

¹⁷⁷ See, e.g., Palmer, *supra* note 131, at 263 (criticizing intellectual property as a form of "illegitimate state-granted monopoly").

¹⁷⁸ "Corrective justice" is a category that today is often associated with backward-looking, *ex post* decisionmaking. In his original formulation, however, Aristotle left open the definition of a "wrong." Conceivably the determination of "wrongfulness" could involve *ab ante* criteria. See Posner, *supra* note 84, at 190-91, 201.

¹⁷⁹ The strongest example of the autonomy concern is the courts' efforts to maintain purchasers' control over their own decisions by denying restitution to most "intermeddlers" who provide services without request. See *infra* notes 198-219 and accompanying text.

¹⁸⁰ Restatement of Restitution, *supra* note 152, § 1.1; 1 Palmer, *supra* note 153, § 1.1, at 5.

plaintiff usually must show either some loss to herself or the violation of some "legally protected interest."¹⁸¹

Restitution doctrines function not only as a remedy for other causes of action but also as an independent source of substantive rights.¹⁸² Thus, when a landowner obtains an award based either on the profits a trespasser gained from the tort or on the amount of money the trespass enabled the defendant to save,¹⁸³ restitution essentially serves as a remedy for the preexisting tort action.¹⁸⁴ By contrast, the cases of both the doctor who renders emergency medical care without a contract and is allowed to sue the patient for payment¹⁸⁵ and the debtor who mistakenly overpays a bill and is able to sue for the overage¹⁸⁶ are examples of restitution creating its own cause of action. Our focus will be on this latter class of cases, in which unjust enrichment provides the substantive basis for the relief granted.

One obvious but key issue is the meaning of "unjust enrichment." As for "enrichment," in ordinary language whenever one is made better off, one is enriched.¹⁸⁷ Though restitution doctrine occasionally departs from this simple formula, it is satisfactory for our purposes.¹⁸⁸

¹⁸¹ See 1 Palmer, *supra* note 153, § 2.10, at 133; see also Peter B.H. Birks, *Restitution and Wrongs*, 35 *Current Legal Probs.* 53, 61 (1982) (distinguishing the "subtraction" sense and the "wrong" sense of the phrase "at the expense of"); 1 Corbin, *supra* note 133, § 19A (Supp. 1991) (arguing that "detriment to the plaintiff" is crucial to quasi-contract recovery).

¹⁸² "In an outline of the sources of civil liability, the principal headings would be tort, contract, and restitution." Douglas Laycock, *supra* note 35, at 1277; see also 1 Palmer, *supra* note 153, § 1.1, at 2 (arguing that liability based on unjust enrichment constitutes a distinct category).

¹⁸³ See *Edwards v. Lee's Adm'r.*, 96 S.W.2d 1028, 1032 (Ky. 1936) (awarding a share of the trespasser's net profits proportional to the physical characteristics and size of the cave involved); *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 239 (Va. 1946) (awarding the market value of the excess use of an existing right-of-way as an approximation of the money saved by a trespass).

¹⁸⁴ I adopt Palmer's view, disregarding the fact that on a formal level such actions may be termed "assumpsit" rather than "tort." 1 Palmer, *supra* note 153, § 2.1, at 51 (reasoning that "the plaintiff's action is based upon the tort whether he sues to recover damages or to obtain restitution. . . [therefore] [t]he expression 'waiver of tort' is inaccurate").

¹⁸⁵ Restatement of Restitution, *supra* note 152, § 116 cmt. a, illus. 1.

¹⁸⁶ *Id.* § 20.

¹⁸⁷ "A person is enriched if he has received a benefit." *Id.* § 1 cmt. a. "The word 'benefit' . . . denotes any form of advantage." *Id.* § 1 cmt. b.

¹⁸⁸ In restitution doctrine, the problem of defining "enrichment" or "benefit" can be complex, but these difficulties largely appear in contexts inapplicable to our discussion. See, e.g., 1 Palmer, *supra* note 153, § 1.8 (discussing the meaning of "benefit"); Jolin P. Dawson,

“Better off” is, of course, a matter of comparison; thus, we will take as our baseline for comparison the level of welfare that the allegedly enriched party would have had in the absence of that interaction with the benefactor or with the things that provide the alleged basis for the duty owed. This is the counterfactual approach familiar from tort law: how the party would have fared *but for* that interaction with the other party is the basis for the dispute.¹⁸⁹ If the defendant is better off than he would have been in that baseline world, he has a “benefit” or an “enrichment.”¹⁹⁰ Conversely, if a plaintiff is worse off than she would have been in the absence of the contested interaction with the defendant, she has suffered a “loss” or a “harm”¹⁹¹ and the expense-to-plaintiff requirement is satisfied.

Restitution Without Enrichment, 61 B.U. L. Rev. 563 (1981) (discussing erasable enrichment).

For a simple example of a difficulty that “enrichment” can pose, consider the case of a doctor who renders emergency medical care without a contract. Can she collect a fee from the patient’s estate if the care was unavailing? The patient was possibly “enriched” during the pendency of the care in that he was given a greater chance of survival, but at the end of the transaction the patient was no better off than if the doctor had not acted. Nevertheless, the doctor will be entitled to the fee. *Cotnam v. Wisdom*, 104 S.W. 164, 166 (Ark. 1907); Restatement of Restitution, *supra* note 152, § 116 cmt. a, illus. 1.

¹⁸⁹ Cf. David Gauthier, *Morals by Agreement* 204 (1986) (“[T]he base point for determining how I affect you . . . is determined by the outcome that you would expect in my absence.”).

¹⁹⁰ Note that the comparison is with a hypothetical world where the plaintiff’s creative acts were absent, *not* with a hypothetical world where intellectual property rules were absent and the plaintiff might have created in any event. For my reasons for this choice of baseline, see *supra* notes 133-48 and accompanying text.

¹⁹¹ Note that I follow what I perceive to be ordinary language patterns here; also, “loss” and “gain” are defined by reference to empirical counterfactuals—how one would fare in the absence of the allegedly harmful or beneficial act. Also, “loss” and “harm” are used interchangeably.

In my view, a violation of exclusivity (a trespasser crosses a border but injures nothing on the land) is different from a temporal loss (a trespasser destroys an outbuilding). To capture this distinction, I will label the former a harmless trespass. I will treat the violation of an exclusive right, therefore, as giving rise to a “wrong” but not as necessarily creating a “loss” or “harm.” Good arguments can be made for the opposite position, however. See, e.g., Feinberg, *supra* note 40, at 106-07.

In our particular context, for example, one might argue that any violation of right is a “harm,” and that the restitution courts recognize this by allowing proof of such a violation to substitute for proof that a plaintiff has suffered a loss when the expense-to-plaintiff requirement is at issue. See *infra* text accompanying 220-21. There is of course some truth in that perspective. *If* a plaintiff had a right to exclude, then violation of that exclusive right could be considered a harm. But because I argue that creators should have no such right—or rather, that a right to exclude is not valid solely on reap/sow grounds—it will be useful to have language capable of distinguishing the two different ways in which the expense-to-plaintiff requirement can be satisfied, namely “wrong” and “loss.”

But defining “benefit” or “enrichment” helps us only to pose the problem. Our law clearly should not and does not allow all benefits to be appropriated by those who create them. In an interdependent world, we all reap without sowing.¹⁹² The very language we speak is something of value for which we have not paid. If free riding is not in itself wrongful, we must define the dividing lines between those benefits for which we should pay and those for which we should not. We must identify enrichment that is “unjust.”

A review of the Restatement of Restitution—and related materials and cases—reveals no particular kind of nastiness that must be proven to support a restitution recovery. Cases of fraud, violations of fiduciary duties, and the like, give rise to restitution, but so do cases in which there is no wrong at all.¹⁹³ Yet the concept of unjust enrichment is not empty. Speaking descriptively and very generally, independently based unjust enrichment appears to include enrichments that are not wrongful so long as they: (1) are unearned and unrecompensed;¹⁹⁴ (2) result from the labor or other resources of plaintiff;¹⁹⁵ (3) are not transferred to the defendant to satisfy one’s legal duty or with donative intent;¹⁹⁶ and (4) occur in contexts where reasons to deny restitution are absent.¹⁹⁷ This may not suggest “injustice” in the popular sense, but it is what the restitution doctrines, taken together, seem to indicate is the operative principle: a weak presumption that reaping without sowing should trigger relief.

¹⁹² See Dawson, *supra* note 13, at 1412; *supra* notes 65-71 and accompanying text.

¹⁹³ See Restatement (Second) of Restitution, *supra* note 127, introductory note, at 7; *id.* § 1 cmt. b, at 10 (“Often a person owes restitution for a benefit he received through entirely innocent behavior”); Restatement of Restitution, *supra* note 152, at 522 (“[r]estitution does not require a wrong by the person who has received the property”); *id.* § 63 cmt. a, at 245 (“a quasi-contractual right is not dependent upon the existence of knowingly wrongful or even tortious conduct by the transferee”); 1 Palmer, *supra* note 153, § 1.7, at 40-44 (discussing both restitution based on wrongs and restitution based on other considerations). In addition, sometimes the desire to provide incentives for the provision of valuable goods and services will favor the grant of restitution.

¹⁹⁴ See *supra* note 193.

¹⁹⁵ See *infra* notes 121, 146-47 and accompanying text.

¹⁹⁶ See *infra* notes 385-86 and accompanying text.

¹⁹⁷ As will appear, reasons to deny restitution include both party-oriented concerns of preserving the defendant’s autonomy and avoiding harm to him and societally oriented concerns of keeping administrative costs low and maintaining markets. See *infra* Parts II.A & II.B.

The obviously interesting question is the nature of the reasons that will operate to defeat the presumption. We now turn to identifying those reasons.

A. Restitution Materials

1. *Officiousness: The Need to Justify the Absence of a Contract*

Someone acts in a way that gives a benefit to another person. She improves another's land or chattel, pays another's debt, provides medical services in an emergency, or supports another's dependent. In response to virtually all of these events, a court first will inquire into the actor's justification for interfering in another's affairs. Ordinarily, "[a] person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution."¹⁹⁸ Absent a request by the recipient, "the claimant must be ready with an explanation why his conduct should not be regarded as officious."¹⁹⁹

The concern evident in this inquiry has several dimensions. First and foremost is the protection of autonomy: the desire to preserve people's control over their own lives.²⁰⁰ Persons should not be forced to become obligors, and they should be free to choose with whom they will deal.²⁰¹ To have to pay for service not ordered, to find one's obligations satisfied in ways one has not chosen, or to find a neighbor demanding payment because he has bought one's son dinner when a meal was waiting at home would play havoc with one's self-determination and one's pocketbook.

The officiousness inquiry also is motivated by doubt as to whether unrequested goods and services are in fact beneficial to the recipient. Such goods and services may be useless or even harmful in themselves—the dinner that prevents the son from eating his scheduled diet—or they may be worth less to the recipient than the price

¹⁹⁸ Restatement of Restitution, *supra* note 152, § 112.

¹⁹⁹ Restatement (Second) of Restitution, *supra* note 127, § 1 cmt. h.

²⁰⁰ It has been argued, for example, that if courts allowed recovery for benefits conferred without request, "the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin." *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332, 338 (1877).

²⁰¹ See, e.g., Restatement (Second) of Restitution, *supra* note 193, § 2 cmt. a; *Dobbs*, *supra* note 158, § 4.9, at 298-305; *Hope*, *supra* note 174, at 30-31; *Wade*, *supra* note 174, at 1183-84.

charged. Because no one can afford to buy all the things she wants and because not all the things one has received are easy to sell, even the presence of significant market value does not guarantee that the recipient has received a "benefit."²⁰²

A third concern that motivates courts to ask whether a benefactor seeking payment had a *reason* to proceed without the recipient's request is the suspicion of intermeddling. Courts fear that people who give benefits willy-nilly may be motivated by a desire to rearrange others' lives to suit their own sense of appropriateness.²⁰³

The court-accepted justifications for volunteering ideally should parallel inversely the concerns just discussed. First, the court should require the plaintiff to show that her actions were not disrespectful of the other party's autonomy and that a demand for payment would not interfere significantly with the other party. Second, the plaintiff should show that her actions conferred a real benefit on the other party. Third, the plaintiff should show she did not intend to inject herself into the other party's life.

The judicially acceptable grounds for volunteering tend to fall into the categories of mistake,²⁰⁴ coercion,²⁰⁵ request,²⁰⁶ and emergency or necessity.²⁰⁷ In part, these grounds meet the concerns just addressed. In an emergency, conferring a benefit shows neither disrespect for another's desire to control his own life nor a desire to obtain power for one's self at another's expense. These concerns similarly are

²⁰² See Peter Birks, *An Introduction to the Law of Restitution* 109-14 (1985); Levmore, *supra* note 38, at 74-78.

²⁰³ Cf. *Wallick v. First State Bank*, 532 S.W.2d 520, 523 (Mo. Ct. App. 1976) (reasoning that it is not the bank's function to determine which of a depositor's alleged creditors should be paid); see also *Restatement of Restitution*, *supra* note 152, § 43 cmt. a ("No protection is deserved by one who intermeddles by paying another's debt either without reason or to secure rights against the debtor without the consent of the creditor."); Hope, *supra* note 174, at 25-31 (tracing the historical development of the concept of "officiousness" and noting its origin in a deeply rooted cultural dislike of voluntary intervention in the private affairs of others).

²⁰⁴ *Restatement of Restitution*, *supra* note 152, §§ 6-69.

²⁰⁵ *Id.* §§ 70-106.

²⁰⁶ *Id.* §§ 107-11.

²⁰⁷ *Id.* §§ 112-17. The cases closest to our fact patterns are those involving mistake and emergency. Much of restitution law concerns failed contracts, but intellectual property involves relations between *strangers*. Cases of "request" and "coercion" will be largely outside our purview.

addressed if the benefactor is operating under mistake or because of request or coercion.²⁰⁸

Concern for the defendant's well-being is not the only reason to demand that the plaintiff have a good reason for bypassing the market. The courts also may be making the substantive, normative judgment that benefactors bear the responsibility of making private arrangements for their own payment and that, in the absence of a special excuse, benefactors are "to blame" for the failure to engage in advance consensual dealing.²⁰⁹

Further, in most areas of law, the courts feel more comfortable imposing liability on *active* parties who have chosen to engage in behavior that imposes on a plaintiff's interest. Because restitution defendants are usually passive rather than active recipients of others' actions, courts are reluctant to impose liability upon them. As discussed earlier, the very paradigm of corrective justice is best described as a relationship between "doer" and "sufferer."²¹⁰ Imposing liability on a non-doer requires special justification.

Most fundamentally, allowing frequent restitution suits when contracts could have been obtained would undermine the market system²¹¹ and overload the judiciary²¹² for no good reason. Consensual transfers are preferable to judicially imposed transfers on virtually all grounds—efficiency, fairness, and autonomy.

Several commentators see a pattern in the cases suggesting that concerns with officiousness largely can be satisfied if the defendant had some control over the benefits—that is, if the defendant actively sought them out or could have refused them.²¹³ Such a defendant has made a choice, so concerns about his harm and autonomy are lessened. Dean John Wade has gone so far as to suggest that virtually the only elements that a restitution plaintiff needs to establish are that the

²⁰⁸ The presence of these grounds for intervening, however, does not guarantee that the recipients in fact will benefit or that no interference with their autonomy will occur. Therefore, additional requirements must further condition recovery.

²⁰⁹ See Fried, *supra* note 172, at 45-46 (discussing notions of responsibility in the context of restitution law).

²¹⁰ See *supra* notes 173-74 and accompanying text.

²¹¹ This concern with the market system may not be articulated explicitly in the cases, but it appears to play a strong role. See Levmore, *supra* note 38, at 79-81.

²¹² See, e.g., Restatement (Second) of Restitution, *supra* note 127, § 2 cmt. a; Dawson, *supra* note 13, at 1418.

²¹³ See, e.g., Dobbs, *supra* note 158, § 4.9, at 303-04; Wade, *supra* note 174, at 1198-99.

defendant is an active party who deliberately used a measurable benefit produced nongratuitously by another.²¹⁴ But that would ignore market-preserving considerations and reopen the danger of paralysis from expansive claims—we all continually and intentionally use measurable benefits produced nongratuitously by others.

The Restatement of Restitution does not go so far. Nor does Professor George Palmer:

In some instances . . . the defendant benefited through exercise of a free choice to accept or make use of a product of the plaintiff's efforts. It does not follow that there is a right to restitution, for the plaintiff may have no legitimate claim of exclusive right to the product.²¹⁵

As I suggested earlier, a creator's corrective justice claim to recompense for her efforts has some weight, but it is slight; other norms may outweigh it. Therefore, the active and intentional role of the defendant is not a sufficient premise for liability. It merely eliminates some of the types of unfairness associated with compulsion of defendants; it does not eliminate all unfairness, for a defendant's failure to refuse a benefit is a less reliable indicator of his preferences than would be an explicit consent to pay.

Finally, the emergency and necessity cases suggest that a need to provide positive incentives sometimes can excuse behavior that otherwise might be deemed officious,²¹⁶ although officiousness still may survive as a criterion of relative fitness.²¹⁷ The Restatement explicitly states that "under some conditions, it is desirable to encourage per-

²¹⁴ Wade, *supra* note 174, at 1212; see also Gordon, *Inquiry into the Merits*, *supra* note 37, at 1456-57 (applying Dean Wade's test to the typical copyright case). My earlier doubts about whether Dean Wade's principle provides adequate boundaries, see *id.* at 1457 n.498, have grown.

²¹⁵ 2 Palmer, *supra* note 153, § 10.10, at 462; see also *id.* at 420-21 (discussing a case denying restitution to a lawyer who successfully contested a will, benefiting third parties who had not contracted with him). Note, however, that Professor Palmer is more open to the notion that having a choice over benefits can be an acceptable premise for liability when the plaintiff has submitted a specific idea to a specific defendant. *Id.* § 10.11, at 463-65; see also Harold C. Havighurst, *The Right to Compensation for an Idea*, 49 *Nw. U. L. Rev.* 295, 300 (1954) (arguing that the defendant often is held liable for restitution when he uses an idea submitted in the course of negotiations with the plaintiff that are initiated by the defendant).

²¹⁶ See Hope, *supra* note 174, at 38-39.

²¹⁷ See Restatement of Restitution, *supra* note 152, § 113; Restatement (Second) of Restitution, *supra* note 127, § 3 cmt. b (the volunteer's "claim may be rejected on the ground that he was not a person properly qualified to intervene in the affairs of the person benefited").

sons to interfere with the affairs of others."²¹⁸ This does not mean, however, that people acting in a generally useful manner will obtain restitution whenever they can prove that transaction costs or other problems make contracting impracticable.²¹⁹ Perhaps out of fear of massive liability, the possibilities of recovery generally are limited to situations of imminent threat to life or property.

2. *Enrichment at the Expense of Plaintiff*

When a defendant violates an established right of the plaintiff, restitutionary remedies usually will apply regardless of whether the plaintiff was injured materially by the violation.²²⁰ If a trespasser saves himself expense or earns a profit, that the trespasser trod so lightly on the grass that not even a blade was bent will not matter; the plaintiff likely will have some claim on the amount so gained.²²¹

Without such a violation of right or some other independently cognizable wrong to her, however, a plaintiff usually must show some loss.²²² The contours of this "expense" requirement are not sharply

²¹⁸ Restatement of Restitution, *supra* note 152, § 112 cmt. b, § 116 cmt. a.

²¹⁹ See Restatement (Second) of Restitution, *supra* note 127, § 3 cmt. b ("[T]he public interest in the conservation of resources in general falls short of the need on which a salvor may base a claim to restitution."); see also Restatement of Restitution, *supra* note 152, § 112 cmt. b & § 114 cmt. b (explaining that the emergency exception applies only in certain narrowly defined circumstances). For a proposal to alter this state of the law, see Long, *supra* note 130, at 415-16 (suggesting that remedies be given whenever transaction costs would block a transfer that would be in both parties' interests).

²²⁰ In such cases, a plaintiff's recovery may make her better off as a result of the invasion than she would have been without it.

²²¹ See *supra* notes 61, 153; see also 1 Palmer, *supra* note 153, § 2.5, at 74-75, 136 (noting that many decisions in recent times have granted recovery in quasi-contract where a trespasser benefits from using the land regardless of injury to the owner). Even now, not all violations of right lead to restitutionary recoveries. For an exploration of this issue, see Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504 (1980).

²²² See 1 Palmer, *supra* note 153, § 2.10, at 133; see also Restatement of Restitution, *supra* note 152, § 1 cmt. d (noting that the benefit to one party and the loss to the other ordinarily are coextensive); *id.* at 522 (reasoning that the definition of restitution implies a loss to the plaintiff). This is not to say that the plaintiff's recovery would be measured by his loss. See Dobbs, *supra* note 158, § 4.5, at 260-61. Peter Birks suggests that there are two forms of unjust enrichment recognized by the law: " 'unjust enrichment by subtraction from the plaintiff' and 'unjust enrichment by doing wrong to the plaintiff.' " Birks, *supra* note 202, at

defined.²²³ As suggested earlier, the requirement may be one of *nexus*: something about the transaction must make *this plaintiff* a proper person to bring suit²²⁴ and must make the plaintiff's claim to the benefit better than *this defendant's*.

I see the question of "loss" also as an outgrowth of the inter-party balancing that sometimes occurs in the restitution area. For example, courts sometimes inquire whether it would be "more harsh" to deny relief to a plaintiff or to force a defendant to pay, and the answer apparently influences the outcome.²²⁵ Without a loss or a violation of an established right, the plaintiff has little to weigh against the defendant's interest.

3. *Avoiding Harm to the Innocent Defendant*

In cases not involving violations of a legal right or other wrongful behavior, courts tend to deny restitution unless the defendant clearly received a measurable benefit²²⁶ and he will not be worse off after the suit than he would have been absent the interaction with the plaintiff.²²⁷ Thus, to the extent one can speak of general rules in restitu-

26; see also *id.* at 132-34 (explaining that the defendant must be enriched "at the plaintiff's expense" for the plaintiff to have a cause of action).

Some commentators go so far as to place "detriment to plaintiff" at the center of the law of quasi-contract. 1 Corbin, *supra* note 133, § 19A, at 53 (Supp. 1991) ("[T]he basis of quasi-contract liability is not unjust enrichment, but unjust detriment.").

²²³ See 1 Palmer, *supra* note 153, § 2.10, at 133-42 (discussing the concept of enrichment at the plaintiff's expense). The authors of the Restatement (Second) of Restitution translate the "expense" requirement as either "loss" to the plaintiff or "an infringement" of his "interest." Restatement (Second) of Restitution, *supra* note 127, § 1. They do, however, note some uncertainty about their own formulation. *Id.* at xiii.

²²⁴ See 1 Palmer, *supra* note 153, § 2.10, at 134; cf. Weinrib, *Causation*, *supra* note 81, at 429-32 (arguing that the plaintiff is linked to the defendant by the symmetrical relationship between causation and wrongfulness).

²²⁵ See Restatement of Restitution, *supra* note 152, § 42 cmt. a; see also Dobbs, *supra* note 158, § 4.9, at 306 (reasoning that the courts "balance hardships of the parties and allow restitution where the hardships upon the recipient would not be great"); *id.* § 2.4, at 52-54 (explaining that courts engage in a "balancing of equities and hardships").

²²⁶ See Levmore, *supra* note 38, at 70, 77-78; Wade, *supra* note 174, at 1186-87.

²²⁷ An innocent defendant—we are assuming that a copier is not a wrongdoer merely by virtue of copying—who has received the benefit of a stranger's services without request generally will be liable for no more than "the amount by which the recipient or his property has benefited." Restatement of Restitution, *supra* note 152, § 155 cmt. d. Persons who violate the rights of others, particularly if they do so knowingly, may be treated quite differently. See, e.g., *id.* § 129(3) cmt. d, illus. 5 (where a trespasser takes shrubs, knowing they are not his, and doubles their value through his gardening efforts, the plaintiff is entitled to their value as improved, thus granting plaintiff the advantage of defendant's efforts). Fiduciaries who violate

tion, the general rule is that one "has no duty to pay for that which has been received without his knowledge or desire and which he cannot return."²²⁸ The ability to return the item speaks to whether the defendant will suffer a net harm if forced to respond in restitution; the defendant's knowledge or desire speaks to the autonomy issue.

If one repairs a car, erroneously thinking that its owner requested the service—a case of "mistake"—one neither shows disrespect for the true owner nor seeks to meddle in another's business. Yet, the owner possibly will not want the repairs, and a judicial order requiring payment may make him worse off than having an unrepaired car. The outcome, at least according to the Restatement, is a compromise. The mistaken improver of chattels cannot sue independently for payment; however, if the improved chattel owner brings an action for conversion, the value of the repairs are deducted from the damages.²²⁹

In other cases of mistake, such as overpayment of debts or transfers of property that can be restored in specie, plaintiffs receive more favorable treatment.²³⁰ Ordering a return of money or in specie differs from ordering payment for services that cannot be returned. The former merely returns the defendant to a status quo ante;²³¹ the interference with the defendant is minimal and relief is more easily granted.²³²

In the absence of some wrongful action, knowledge, or misrepresentation by the defendant, the courts usually show solicitude for the

their trust, for example, may be required to disgorge all profits, including those that result not from the plaintiff's resources but from the fiduciary's own entrepreneurial ability. See 1 Palmer, *supra* note 153, § 2.11. A trustee may be held "accountable for the profits made by his employees even though he received none of the profit." *Id.* § 2.11, at 142.

There are exceptions even for innocent recipients. See, e.g., Restatement of Restitution, *supra* note 152, § 1 cmt. e (estate or family of an accident victim who is assisted skillfully, but fruitlessly, by a medical professional during an emergency must pay regardless of the fact that the defendant was not "enriched thereby"); *id.* § 155 cmt. d. There is enough flexibility in the term "benefit," however, that some such exceptions can be rationalized as not exceptions at all. For example, such a patient's "better chance of recovery" is said to constitute a benefit "although . . . no recovery [of health] is effected." *Id.* It generally is asserted that "if the transferee was guilty of no fault, the amount of recovery is usually limited to the amount by which he has been benefited." *Id.* § 1 cmt. e.

²²⁸ Restatement of Restitution, *supra* note 152, § 40 cmt. b.

²²⁹ *Id.* § 42(2).

²³⁰ See *id.* § 40 cmt. a, § 56 (explaining that restitution is not granted as freely for benefits that cannot be restored in specie).

²³¹ See *id.* § 56.

²³² See Dobbs, *supra* note 158, § 4.9, at 302-03.

defendant.²³³ There are several possible explanations for the emphasis that some courts place on “avoiding harm” to the innocent beneficiary. The first may be a desire to maintain clean judicial hands. Given the special nature of state power, arguably it is worse for a judge to do harm—other things being equal—than for a private party to do harm or to reap an unearned gain. This is particularly true when the defendant is not a wrongdoer.²³⁴

A second explanation of judicial solicitude for the restitution defendant stems from the priority that avoiding harm arguably occupies in our system of law. In our law, the imperative to avoid harming our neighbors is stronger and more deeply entrenched than the duty to reward those who have benefited us. If by nothing else, this observation is supported by comparing the historic importance of tort law with that of restitution law. Other societal values seem to express a similar preference. The Ten Commandments, for example, prohibit various harms but do not order payment for beneficial acts.

A third possible explanation for the courts’ efforts to avoid imposing net harm on defendants is substantive. The courts may derive the appropriative principle, in part, from a “do no harm” principle. If so, the logical hierarchy would seem to dictate that when the two princi-

²³³ Other examples of this solicitude for defendants are found in the rules on changed position that by and large favor defendants, at least where the defendants themselves are not wrongdoers. See Restatement of Restitution, *supra* note 152, §§ 69, 142. Note, however, that Professor Dobbs believes that some of these differences partially reflect the differences in available alternative remedies. Dobbs, *supra* note 158, § 4.6, at 280-81; see also 3 Palmer, *supra* note 153, at 527-29 (discussing change of position in the mistake context).

The defendant who receives property by mistake probably need not pay if the property is lost before the mistake is discovered. Dobbs, *supra* note 158, § 4.6, at 280-81. Similarly, the recipient of undesired and unrequested goods “is subject to no duty of restitution” if he has not accepted the offer that they represent and if “the things are destroyed or lost without his fault.” Restatement of Restitution, *supra* note 152, § 56 cmt. b; cf. 39 U.S.C. § 3009 (1988) (eliminating the duty to return unordered merchandise sent by mail). Further, a person often is relieved of the obligation to make restitution when his position has changed as a result of his innocently receiving another’s funds and making expenditures he otherwise would not have made. See 3 Palmer, *supra* note 153, § 16.8, at 523-27 (discussing mistake and change via expenditures by the defendant). But see Dobbs, *supra* note 158, § 11.9, at 769-71 (noting limitations on courts’ recognition of expenditure as a change of position).

²³⁴ This is one explanation for the famous case of *Spur Industries v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972), where the court felt required to declare a certain preexisting land use a nuisance but conditioned relief on the plaintiff’s willingness to pay the relocation costs of the nonwrongdoing defendant.

ples conflict, the courts should defer to the “do no harm” principle.²³⁵ John Locke’s labor theory of property can illustrate how a right to payment for benefits might be derived from a right against harm.

Locke’s primary argument for property depends on three steps.²³⁶ First, he took from his religion the proposition that “no one ought to harm another in his life, health, liberty, or possessions.”²³⁷ Second, he argued that each person has a property in his body and in the labor of his body.²³⁸ Third, he posited that when one appropriates things from the common—picking apples or drawing water from the river—one joins one’s labor to the things so taken.²³⁹ Thus—and this is implicit—to take the apples or water from the laborer would harm him because his labor was joined to these items of sustenance. Because persons are under an obligation not to harm others’ property, and because labor is the laborer’s property,²⁴⁰ Locke could conclude

²³⁵ This third argument suggests that the two principles—“do no harm” and “do not reap without sowing”—may not be simply two independent principles of differing weight, but that the first may be the source of the second.

²³⁶ I here interpret Locke’s “labor-joining” argument. See Locke, *supra* note 74, at 134. Other interpretations of the argument also exist. See, e.g., James Tully, *A Discourse on Property: John Locke and His Adversaries* 116-21 (1980) (offering a different interpretation of Locke’s “labor-joining” argument). Locke presents additional arguments for property of an entirely different sort—for example, those regarding the beneficial results of property ownership. Locke, *supra* note 74, at 139-40, 143-46.

²³⁷ Locke, *supra* note 74, at 123-24. “[M]en being all the workmanship of one omnipotent . . . Maker . . . they are his property whose workmanship they are, made to last during his, not one another’s, pleasure.” *Id.*

²³⁸ *Id.* at 134.

²³⁹ *Id.* at 134-35.

²⁴⁰ It is essential to the Lockean schema that he make this assumption that the individual has ownership rights in her own labor. Without it, a right against harm yields only indeterminate results in all but the rarest of circumstances.

Consider, for example, the effect of Locke’s proviso suggesting that property can result from appropriation only if “enough and as good” is left for others. *Id.* at 134. The proviso often is interpreted as giving persons other than the appropriator a right against being harmed by the appropriation. If the proviso is satisfied, strangers and neighbors have no right to complain of the appropriation. Defining “harm” is problematic, however, as “[t]he proviso itself cannot settle what is to count as the baseline of disadvantage and thus as the ground of complaint.” Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 *Cardozo L. Rev.* 1283, 1295-96 (1989) (criticizing all attempts to found rights on considerations of advantage or welfare). If, for example, the nonlaboring stranger plausibly could claim an entitlement to both the common and the fruits of others’ labors upon it, the stranger intelligibly could claim to be “harmed” whenever others appropriated the fruits of their own labors rather than giving them to the stranger. It is the right to one’s own labor that limits the nonlaboring stranger’s claim.

Locke believed that the stranger has a right to complain about the loss of her equal opportunity to use and to appropriate the common. Locke, *supra* note 74, at 137. This belief

that others have no right to that to which someone else's labor is "joined."²⁴¹ In short, one who labors to draw forth objects from the common plenitude "has a property" in the things so gathered, at least as long as there is "enough and as good" left for others,²⁴² perhaps because others are under an obligation not to harm the laborer by taking from him his labor and the things to which that labor is attached.

I suspect that this sort of logic, which I attribute to Locke, may play a role in restitution cases. It helps to explain why some courts prefer to leave a benefactor without recompense rather than to risk making a nonwrongdoing beneficiary worse off after suit than he would have been had the putative benefit never been rendered.²⁴³ If the restitutory principle depends on a moral command to avoid

places a limit on what the first laborer is entitled to claim. These are normative positions that Locke assumes rather than defends. When the stranger's claims to use and appropriate the common herself in the future can be satisfied simultaneously with satisfying the laborer's claims, no one has ground to complain and, Locke seems to assume, property then can result. *Id.* at 136-37.

²⁴¹ Here Locke arguably builds upon one of his earlier notions of "property": an entitlement not to have what one owns unjustifiably taken away or harmed. *Id.* at 123-24. Locke's views on the meaning of "property" are complex. See, e.g., Tully, *supra* note 236, at 60-79 (examining Locke's many views of property).

²⁴² Locke, *supra* note 74, at 134. The proviso that there is a clear case for property only if "enough, and as good" is left for others constitutes an additional "do no harm" principle. It assures that the laborer has no clear claim to property unless he gave no one else a ground for complaint when he joined his labor to some portion of the common resource and appropriated the result. But see Beeker, *supra* note 76, at 42-43 (criticizing the idea that property rights gained by virtue of labor do not constitute a loss to others).

²⁴³ A harm-oriented logic also may help to explain other aspects of restitution law, such as the importance of the voluntariness of the defendant's receipt of benefits. Assume that a benefactor, plaintiff *P*, labors and that a free rider, defendant *D*, benefits by that labor. Depending on how unavoidably or deliberately *D* has utilized those benefits, we might say, respectively, that *D* has "received" *P*'s labor, or that he has "taken" *P*'s labor. In the latter case—arguably following Locke—we might feel comfortable saying that *D* has "harmed" *P*. To the extent that choosing to cause harm tends to trigger liability in our system, this might help to explain why active *D*s are more likely candidates for suit than passive *D*s.

I do not mean to suggest that in our system voluntary action must be present before any of the legal results that usually follow "doing harm" can be imposed legitimately. Although acting to cause harm or to reap benefit is more likely to trigger an obligation of payment than is passivity, the latter is not ipso facto exempt.

That the strongest tort and restitution suits involve relatively active defendants is, in my mind, attributable more to considerations of *fairness* than to Epsteinian notions of *causation*. In some situations, it would not be unfair to impose payment obligations on passive persons. Consider, for example, the obligation of an overpaid creditor to return the overage. See *supra* text accompanying notes 230-32.

harm, the principle rightfully could not be used in a way that imposes harm without raising additional problems of justification.

Even in cases where defendant *D* "harms" plaintiff *P* by actively and intentionally taking her effort in a way that deprives *P* of something she otherwise would have had, an "avoid harm" principle standing alone does not justify a court's doing more than correcting the imbalance. Unless something about *D*'s act is independently wrongful or other considerations are involved, the putative harmfulness of *D*'s act does not justify a court in remedying *P*'s loss by imposing a money judgment or other relief that makes *D* worse off than he would have been before the interaction with *P* began. If the court took that step, it would harm *D* more surely than *D* harmed *P*.

If courts implicitly give a priority to avoiding harm, this might explain why plaintiffs in restitution actions find it difficult to succeed on a complaint of unjust enrichment unless they can prove that somehow the defendant gained at their expense.²⁴⁴ This priority is also consistent with limiting the scope of the reap/sow principle to one's expected harvest.²⁴⁵

In sum, a plaintiff must do more than prove that she was not seeking to control another's life if she is to obtain restitution. Inter alia, a plaintiff must show some "expense" to herself and that giving relief will not harm the defendant or significantly diminish his autonomy.

²⁴⁴ Note, however, that the *extent* of the plaintiff's loss would not limit the measure of her recovery in restitution. Availability of restitution is a separate issue from the measure of relief.

²⁴⁵ See *supra* notes 153-64 and accompanying text. When *D* does something creative with *P*'s work that *P* could not have anticipated and that costs *P* nothing, as compared with *P*'s status quo ante, the fairness argument is weak for *P*. In such cases, *D* enjoys the fruits of *P*'s labor in a way that does not interfere with *P*. Enforcing *P*'s claim would, on the contrary, greatly interfere with *D*'s plans.

Locke is of little help in such cases as he only discusses objects that the laborer will lose if the covetous stranger makes use of them; he does not discuss objects from which two parties simultaneously can draw benefits. Locke, *supra* note 74, at 137. In his discussion most analogous to the topic, Locke indicated that when the fruits the laborer has gathered are in danger of *spoiling*, the laborer loses his title in them. Rather than have the harvest go to waste, Locke writes that others are free to take the benefit of the laborer's earlier efforts and appropriate the fruits from him. *Id.* at 136, 144. Although the import of Locke's "waste" discussion is much debated, one possible meaning is that the laborer has no claim in what he himself would not use. If so, then the requirement that *P* show a loss as prerequisite to recovery is further consistent with the Lockean approach.

B. Autonomy and Efficiency as Possible Influences on the Restitutory Claim

The restitution courts' concern for the defendant's autonomy and well-being, and their concern with societal economic effects, may reveal something about the internal structure of the appropriative claim. I suggest that the restitutory claim is most intelligible when seen as a *relational* matter between the parties. Thus, preservation of autonomy and avoidance of harm may play a crucial explanatory role on both sides—plaintiff's and defendant's—of the restitution equation.

1. Voluntary Action and the Relational Nature of Restitution

From the point of view of autonomy, the strongest claims for judicial intervention occur when a defendant who knowingly risks affecting another's interests is sued by a plaintiff who was helpless to avoid the effects of the defendant's acts. One can see the importance of this consideration by comparing typical tort causes of action with the "intermeddler" cases within restitution and then by comparing these with the cases in which a deliberate copyist is accused of misappropriation.

There is an element of voluntariness in the actions of any benefit-generator. If the benefit-generator works in a context where, despite her hopes of profit, she has no assurance that she will be paid for or will be able to keep the fruits of her labor, then to some extent she knowingly takes a risk. This may not by itself defeat a right to payment, but it does create a weakness in the creator's claim that is not present, for example, in the claim of the typical victim of a harm.²⁴⁶ Persons who have not contributed to their own woes, like the typical victims of harm, are more attractive candidates for relief than the typical restitution plaintiffs.

Similarly, the person who has acted or who otherwise has "made a choice" is a more plausible defendant from the perspective of autonomy than one whose "wrong" was a passive one.²⁴⁷ Thus, although

²⁴⁶ Unless a victim has contributed meaningfully to his own situation—through carelessness or self-destructive behavior—the plaintiff in a tort context merely suffers the harm, typically with little voluntariness involved.

²⁴⁷ See Oliver W. Holmes, Jr., *The Common Law* 95 (1881) ("The requirement of an act is the requirement that the defendant should have made a choice [The defendant must have some] power of avoiding the evil complained of").

autonomy has not been the only relevant consideration, tort causes of action historically have tended to be limited to active defendants sued by comparatively passive plaintiffs.²⁴⁸ Such pairs are strong candidates for judicial intervention.

In the restitution cases falling under the "volunteer" or "intermeddler" doctrine, parties typically have the opposite alignment. In those cases, plaintiffs who voluntarily have chosen to provide goods or services without a prior assurance of payment, and thus have weak claims to payment, typically are paired with recipients who did not request the things provided and who may be unable to divest themselves of them—and thus have strong claims to be free of liability. One might call these the "paradigmatic pairs" of the intermeddler cases: an active benefactor sues a passive recipient.

Thus, consider the case of the vacationing homeowner *D* who returns home to find that an itinerant volunteer *P* has painted his roof. In these cases *P* renders a service to *D* and then sues *D*. *D* has done nothing. Not surprisingly, under the intermeddler doctrine, *D* would not be compelled to pay.²⁴⁹ Given the weakness of the active plaintiff's claim and the passivity of the defendant, this paradigmatic pair forms a strongly unattractive scenario for judicial intervention.

In the misappropriation cases and the other forms of restitution sued upon in the context of intangibles, the result today may well be different. *D* often is forced to pay.²⁵⁰ The difference in result may rest in part on the fact that a creator of intellectual products has a greater

²⁴⁸ Only with the fairly recent advent of comparative negligence have at-fault, active plaintiffs been able to recover in negligence law. See Restatement (Second) of Torts § 467, special note (1965). Similarly, in recent years passive defendants have been forced to pay increasingly often. Consider, in this context, the growth of exceptions to the rule that one has no duty to rescue. See, e.g., *id.* §§ 314-24. Yet even today, suits by passive plaintiffs against voluntary actor defendants face fewer barriers than do suits where either the plaintiff's passivity or the defendant's activity is missing.

²⁴⁹ See Restatement of Restitution, *supra* note 152, § 2, § 112 illus. 3; Hope, *supra* note 174, at 29-31; Wade, *supra* note 174, at 1198 ("A person is ordinarily not required to pay for benefits which were thrust upon him with no opportunity to refuse them."). In this example, I am assuming the volunteer painted the house in the hope of payment from *D* and without any request, mistake, or other special circumstance.

²⁵⁰ See, e.g., *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983). For historic examples, see *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d (N.Y. App. Div. 1951).

need for judicial intervention to provide incentives²⁵¹ than does the typical volunteer or intermeddler.²⁵² I suggest, however, that the more significant difference is party-oriented, focusing on the defendant's active or passive role. In the typical dispute over intangibles in which recovery is granted, the defendant is an active party, a knowing and intentional copyist.²⁵³ Similarly, in the relatively rare volunteer/intermeddler cases where a volunteer *P* is allowed to collect, the facts often show that the defendant willfully had chosen to avail himself of the benefits provided.²⁵⁴

From these observations emerge several important conclusions that underline the difference between restitution and property. First, the differing outcomes illustrate that restitution is a relational cause of action. When a voluntary actor's claim as plaintiff is addressed to a paradigmatically passive defendant, the actor is termed an intermeddler and her claim to restitution is denied. When that same actor's weak claim is addressed to a defendant who had some control over the receipt of benefits, however, the plaintiff often can recover. One might conclude that the plaintiff wins only when the defendant can offer no good reason *not* to pay.

From the point of view of voluntary action, recovery in restitution seems to depend on the consolidation of a weak plaintiff's claim with an even weaker defendant's claim.²⁵⁵ The strength of one party's

²⁵¹ See Wendy J. Gordon, *Prisoner's Dilemma and Asymmetric Market Failure in Intellectual Property*, 17 U. Dayton L. Rev. (forthcoming 1992) [hereinafter Gordon, *Prisoner's Dilemma*] (briefly discussing *ab ante* incentives).

²⁵² For example, it might be argued that intermeddler services run the gamut of possibilities from negative value (painting someone else's roof chartreuse) to positive value, whereas intellectual products used by other persons tend to be more uniformly positive. Of course, this empirical estimate could be challenged (consider, for example, pornography).

²⁵³ A person who writes and publishes a book certainly operates in furtherance of his or her own interests, as does the volunteer painter who hopes to be paid. Except as to someone who has bargained with the author for production of the work—such as a patron, granting agency, employer, or contract publisher—the author is a sort of volunteer. Someone who wishes to copy the author's book draws from it benefits in excess of those received by the usual reader—benefits not reflected in the book's purchase price. Absent copyright law, the author might be left to sue on a restitutionary cause of action. Unless something distinguishes the author's relationship with a copyist from the painter's relationship with the homeowner, such a suit likely would fail.

²⁵⁴ See Wade, *supra* note 174, at 1198-99.

²⁵⁵ See Dawson, *supra* note 13, at 1417-18 (arguing that "the claim of the self-seeking producer of a stranger's gain is marginal at best" and that such plaintiffs tend to recover only if conjoined with defendants who "contributed nothing to their own enrichment and . . . [whose gain] is the traceable product of the producers' loss"); see also *id.* at 1457-58 (concluding that

claim is weighed against the other's, both in terms of the impact on autonomy, and in terms of their respective utility calculi. In particular, much seems to turn on the defendant's ability to avoid receiving the benefit upon which the plaintiff is suing²⁵⁶ and on a weighing of the comparative "harshness" that the ruling would impose on the two parties.²⁵⁷

Property law, by contrast, is much less willing to weigh the interests of strangers against those of the property owner, particularly where intentional actions are concerned.²⁵⁸ Property rights give owners *prima facie* claims that are presumptively "good against the world" rather than against particular parties.²⁵⁹ An innocent trespasser is as liable as a knowing one.²⁶⁰ By contrast, the benefit-creating labor that suffices to justify a plaintiff's restitutionary award against a defendant who knowingly avails himself of the plaintiff's labor might not justify that same plaintiff's prevailing in a context where the defendant innocently receives the putative benefit.²⁶¹

Second, the above suggests that the driving force behind the new misappropriation cases may not be the strength of the plaintiff's claim, but rather the weakness of the defendant's.²⁶² In property law, the opposite is true; such great deference is given to the plaintiff's interest that it prevails even when the defendant has a strong argu-

self-serving intermeddlers recover restitution only in situations where those who have gained did so "without effort or contribution of their own").

²⁵⁶ See *id.* at 1417-18; Dobbs, *supra* note 158, at 301-05; Wade, *supra* note 174, at 1195-1205.

²⁵⁷ See Restatement of Restitution, *supra* note 152, § 40 cmt. e, § 42 cmt. a.

²⁵⁸ As defenses to trespass actions, the doctrines of private and public necessity are quite constrained. Nothing approaching an equal weighing of plaintiff's and defendant's interests is even attempted.

²⁵⁹ For example, an intentional trespass claim is good against both knowing and innocently erring entrants to the owned realty. See Restatement (Second) of Torts, §§ 163-64 (1965). Of course, "good against the world" is an exaggeration. Some defenses are available even against a property-based claim like trespass, and an unintentional, nonnegligent act can damage property without the owner's being entitled to recover.

²⁶⁰ *Id.* Copyright does not require proof that the defendant knew he was infringing; copyright tends to follow the property model rather than the restitutionary model.

²⁶¹ See *infra* note 278.

²⁶² Ronald Dworkin, *Taking Rights Seriously* 171-72 (1978) (distinguishing right-based and duty-based theories).

ment on his own behalf.²⁶³ In restitution, the cases manifest lesser deference to the plaintiff's interest.

Third and finally, this discussion of inter-party weighing leaves unaddressed the role that factors other than the comparative voluntariness of a plaintiff and a defendant should play in the new jurisprudence of benefits. For example, in the realm of intellectual products, if a defendant is prevented from serving the public's interest in access to or interpretation of plaintiff's work, profound negative effects on public discourse may result. The pattern in restitution suggests that some kinds of public interest, including the preservation of markets, can and should be accommodated.²⁶⁴ Restitution cases do not address the possible noneconomic "merit good" or First Amendment issues that affect intellectual property problems.²⁶⁵ Nor is restitution equipped to deal with the "deadweight loss" that granting rights in intellectual products may impose.²⁶⁶

2. *Autonomy in the Broader Context of Community Notions of Fairness*

One might argue that the principle of autonomy gives no guidance because autonomy claims are always symmetrical. What one party wants, the other party does not want. In this vein, I have argued that "[a]n approach that says 'favor liberty and avoid compulsion' without specifying the kinds of liberty and compulsion is . . . radically indeterminate."²⁶⁷ Yet, in everyday parlance, freedom and autonomy connote more than the "yes or no" question of whether one's will is honored in a given case. One can be "more" or "less" free, depending on the strengths and advantages one has to implement one's

²⁶³ For example, a defendant who believes he is not acting wrongfully when he unknowingly crosses a boundary line seems to have a fairly strong argument that he should be free of liability. Nevertheless, if sued in trespass he will be liable. See Restatement (Second) of Torts § 164 (1965).

²⁶⁴ See, e.g., Restatement of Restitution, *supra* note 152, § 62 (transferee protected by public policy).

²⁶⁵ I address these noneconomic issues at more length in Gordon, Equality, *supra* note 64.

²⁶⁶ See *supra* note 29 (defining "deadweight loss").

²⁶⁷ Gordon, Inquiry into the Merits, *supra* note 37, at 1430; see also *id.* at 1425-35 (arguing that consent should not be used as a criterion for moral adequacy independent of an inquiry into the moral justifiability of the pattern of entitlements against which the consent was extracted).

desires.²⁶⁸ This is of course a nonabstract notion of autonomy,²⁶⁹ a view of one's control over life—including benefits and burdens, gains and losses—in terms of the concrete contingencies of daily life.²⁷⁰ There may be degrees to which one's ability to pursue one's own ends may be interfered with, *degrees* of nonabstract autonomy.²⁷¹ If so, then some of restitution law conceivably might be understood as resulting from a comparison of the parties' stakes in terms of this interest.

When the Restatement's authors consider whether granting relief would be "more harsh" to the defendant than would be denying relief to the plaintiff,²⁷² they may be groping for some such comparison of the parties' autonomy stakes.²⁷³ At least one group of commentators

²⁶⁸ See Isaiah Berlin, Two Concepts of Liberty, *in* Four Essays on Liberty 118, 122-34 (1969).

²⁶⁹ Immanuel Kant's interest was in the abstract realm; mere real-world consequences would be irrelevant to his conception of the autonomous will. See Weinrib, Causation, *supra* note 81, at 449.

²⁷⁰ A notion of autonomy as the ability to have one's desires or whims carried out is also non-Kantian.

²⁷¹ One easily might argue that I am posing a utility argument in autonomy clothing. I indeed do see the two interests as intimately connected. For example, being compelled to hand over a resource involves a disutility greater than the simple market value of the resource itself.

In my view, most of the evils popularly connected with loss of autonomy, cf. Epstein, *supra* note 90, at 189-204 (discussing the problem of the good Samaritan), would be avoided under a utilitarian regime. Further, I do not concede that interpersonal comparisons of utility are inherently any more difficult to perform than are the estimates that judges, administrative agencies, or scholars routinely try to make of likely economic effects. See, e.g., Brian Barry, *Political Argument* 44-47 (1990) (defending interpersonal comparison of utility).

²⁷² See Restatement of Restitution, *supra* note 152, § 40 cmt. a, § 42 cmt. a; see also Dobbs, *supra* note 158, at 306-07 ("balancing of hardships" in each case).

²⁷³ At least one commentator applying a Kantian notion of autonomy, although admittedly a quite different notion than the every day notion of "the ability to pursue one's own ends," has suggested that substantive rules of noninterference can be derived from the "formal and abstract" equality among property holders. See Weinrib, Causation, *supra* note 81, at 426-29. Weinrib suggests that applying the "objective" standard in negligence law, as embodied in Learned Hand's *Carroll Towing* test, involves a defendant's recognition that the "interests [of others] have the same claim to consideration as his own." *Id.* at 428.

Weinrib argues that the negligence standard appropriately applies to accidentally caused harm. See *id.* at 427-28. By contrast, we have considered primarily intentional action. Perhaps in inquiring into "harshness," the authors of the Restatement of Restitution are treating the necessity of interaction in a community as a functional equivalent to inadvertence in the accident context.

My use of the negligence analogy might be misunderstood as arguing that courts should permit free riding that generates more profit for the copyist than cost to the original creator. This is not my point. First, in cases of that kind the copyist will be able to *pay* for a license to make the desired use (so long as market failure is absent); if no legal privilege of copying must

has sought to resolve intellectual property questions in terms of this inquiry, asking what “the impact upon the value at stake, namely, freedom of action” is for each party.²⁷⁴

If a balancing of such interests is the operative notion, that suggests one reason that a creator might have a stronger claim to what she has made than a copyist would. To the extent a creator labors toward a goal, she has forgone alternative investments of effort and reduced her available avenues of action. Thus, the particular avenue remaining has great importance for her, and interfering with it may render purposeless many of the prior choices she has made. For the copyist, however, closing this particular avenue arguably will mean comparatively little, for he has little prior investment in its pursuit. Although both may value equally the profits at issue, only for the creator does the creation embody a host of prior sacrifices and the implementation of her distinct and general goals.²⁷⁵

The case may be harder when the copyist has his own more general goals for which copying is essential. For example, the copyist may want to paint landscapes of all public areas in his town in order to preserve a historical record, and it may happen that the statue in the central square was sculpted by a creator who disapproves.²⁷⁶ But at least where such complications are absent and one party has invested in the creation of something in which the other has not, then *ceteris paribus*, a respect for persons as equals might join with the prima facie entitlement over one’s labor to suggest that the creator’s claim against

be given to ensure that an economically desirable use be made, then the economic desirability of that use provides no argument for free use. See *Harper & Row Publishers v. National Enters.*, 471 U.S. 539, 559 (1985). Second, the balancing envisioned here is not a narrow cost-benefit calculus, in which the value of the contested resource is considered independent of the mode of transfer. The *mode* of transfer (compelled or consensual) can inflict disutility that needs to be assessed.

²⁷⁴ S. Coval, J.C. Smith & Simon Coval, *The Foundations of Property and Property Law*, 45 Cambridge L.J. 457, 467-72 (1986). Of course this kind of inquiry is unlikely to decide many particular cases. In evaluating Britain’s equivalent of *INS*, *Victoria Park Racing & Recreation Grounds Co. v. Taylor*, 58 C.L.R. 479 (1937), even Coval, Smith, and Coval are forced to resolve at least one of their hypotheticals by positing that the defendant was utilizing a means “already owned by” the plaintiff—the very question to be decided. *Id.* at 471.

²⁷⁵ Underlying this also may be a substantive notion of fairness or of what it means to live a good life. Taking advantage of “another’s pains” may be seen either as unfair or as inhibiting the copyist’s own development.

²⁷⁶ This may be one reason why current copyright law is likely to give the painter a fair use privilege to include the statue in his painting.

the copyist should be honored.²⁷⁷ Of course, *cetera* are never *paria*. When all other things are *not* equal, other norms must play a role.

This logic suggests that the courts' concern for the defendant's autonomy may be matched by a concern for the plaintiff's autonomy and that the latter helps to generate the plaintiff's restitutionary claim whenever it is stronger than the autonomy interest on the other side. This logic arguably is at work in those cases in which restitution is granted because the beneficiary had special knowledge and power that undermined his autonomy claim and augmented the benefactor's.²⁷⁸

²⁷⁷ Cf. Weinrib, *Causation*, supra note 81, at 428 (arguing that the negligence standard "is a reflection of the formal equality of the rights-holders, setting the terms on which they can interact as equals").

²⁷⁸ One example might be if the homeowner in our painting example knew that the painter had been responding to a neighbor's call and had misread the house numbers. Without that knowledge, the arguments against restitution are strong. See Levmore, supra note 38, at 74-79, 84-87. If, however, the homeowner stood by silently, grinning to himself at the thought of having his roof painted for free, his disrespect for the painter's life plan, coupled with the fact that the erring painter had committed no equivalent act of disrespect, might explain the court's willingness to impose an obligation of restitution. See Wade, supra note 174, at 1198-99 (owner obliged to pay in such a case).

The recipient's "conduct in permitting the continuance of the services subjects him to liability." Restatement of Restitution, supra note 152, § 40 cmt. d (defendant's conduct may amount to an acceptance); see Birks, supra note 202, at 104 (discussing "free acceptance").

Whether the reason for such results is described technically as estoppel or as acceptance, it also can be described in terms of fairness. The defendant is ill-situated to complain that the plaintiff has imposed on his autonomy when he stood by as the other worked, hoping to benefit by the other's error. His action suggests not only that he desired to receive the result of the other's efforts, but also that he has no respect for the other's desires.

The position of a defendant who knows that services are being rendered is "weak" even against a "risk-taking volunteer" because "when [the defendant] begins to say that the plaintiff chose to run the risk of disappointment he is immediately trumped by the reply that if he had spoken out there would have been no risk to run." *Id.* at 104. Note that these are not cases that require significant effort by the defendant to keep the plaintiff from a fruitless investment of labor. Also note that the paint job is something for which a homeowner ordinarily would expect to pay. When considering a cause of action about intangibles that are not preexisting subjects of ownership for which payment ordinarily is made, the argument in favor of restitution might be harder to make even given an equally callous beneficiary.

Notions of weighing the impact on both parties' life plans also may help to explain the "mistaken overpayment" cases. If a debtor overpays a debt, she admittedly once had an entitlement to the money used. But now she has paid it to someone else. Why should she be favored over the recipient? One possible answer might be that it might be more harsh to leave the payor without recovery than to impose an obligation on the defendant. For the plaintiff, the amount of overpayment ordinarily will reflect money earned and thus sacrifices made; for the defendant, the overpayment is a windfall on which nothing usually rests. If a defendant who receives money by mistake does change position in reliance on the money received, the

The comparison of “hardships” or autonomy claims should not be required to bear much weight, however, for one’s investments and expectations may depend upon the law. For illustration, return to the case of copying. If the law warns authors that they cannot expect recompense, then they likely will not invest much of themselves in life plans that depend on receiving compensation for creativity, and the investment-based “autonomy” argument in favor of payment would appear weaker as a result.²⁷⁹ More generally, just as the context, or the law, might warn a potential beneficiary that he is about to avail himself of a benefit in which another claims an interest, the context, or the law, might warn a potential benefactor that she proceeds at her own risk because the law gives no assurance of repayment.²⁸⁰ The autonomy argument should be available for unrecognized as well as recognized legal claims.

3. *Economics*

One final set of observations is in order. Restitution cases apparently grant recompense where party-oriented fairness concerns conjoin with societal concerns, notably with economics. This sort of redundancy is common in the law but is particularly noteworthy here. Restitution seems to be denied where it would impose unfairness, either by threatening an innocent defendant’s autonomy or by imposing a net harm on him, or where a restitutionary right would impose high systemic costs by undermining the market and burdening the

courts sometimes reduce his otherwise-applicable duty to repay. See 3 Palmer, *supra* note 153, § 16.8, at 522-27.

The courts do not, of course, condition restitutionary recoveries on the plaintiff’s ability to prove she earned the money at issue. Other explanations for the mistaken overpayment cases exist. For example, allowing recovery of overpayments respects initial entitlements and may facilitate transactions by removing the risk that errors will be permanent. (I am indebted to William F. Young here.)

Also, there is another economic reason to favor a plaintiff who has earned the money over a recipient who has not. The prospect of random gains and losses tends to discourage productive behavior by severing the apparent relation between effort and income. See *infra* text accompanying note 284.

²⁷⁹ Some conceptions of autonomy, however, might go well beyond a notion of investment—to embrace, for example, an author’s interest in “living fully.” Because there is little consensus on these broader conceptions of autonomy, I identify only one of autonomy’s hard-to-dispute elements—the preservation of a life plan to which one is committed.

²⁸⁰ Just as a potential beneficiary may have some choice about accepting benefits that bear a price tag, a potential benefactor may have some choice about generating benefits that will not be recompensed.

courts. But no precise dividing line can be drawn between economic issues and fairness issues because one of the key economic concerns—preservation of markets—arguably is also an autonomy concern.²⁸¹ Moreover, other key economic issues, such as the imposition of high systemic costs that will be borne by third parties, also can be viewed as a concern with minimizing harm. Further, awarding restitution not only gives a laborer her arguably “just reward”; the availability of restitution also may have an economic effect by giving similarly situated persons an incentive to invest time and money into new creative work by promising them a significant degree of internalization of benefits produced.

Nevertheless, economics can be disentangled from other concerns in some factual settings, and one tentative observation emerges that might be surprising from the perspective of aggregative economics.²⁸² Courts apparently view a mere transfer payment—a distributional rather than an allocatively oriented change in resource holdings—as desirable. Other things being equal (e.g., autonomy and market-preservation concerns not being implicated in a given case), the courts seem to prefer that benefactors receive payment.²⁸³

Yet even this preference can be interpreted economically. Ordering restitution undoes random events, such as mistake and failed contracts, that, if left unremedied, may erode a person’s confidence that her efforts will bear reliable fruits. Providing incentives by preserving a perceived connection between effort and income is a long-recognized economic goal.²⁸⁴

The next section will demonstrate that the stand-alone principle—the desirability of paying those whose labor yields benefits for

²⁸¹ Markets involve not only a much lower level of transaction costs than do court-supervised transfers, but they also involve consensual dealings, albeit in a limited sense. On the nature of those limits, see Gordon, *Inquiry Into the Merits*, supra note 37, at 1425-35 (examining the use of consent as a criterion for moral adequacy).

²⁸² Aggregative economics—usually associated in the legal world with Judge Richard Posner’s “efficiency” criterion and in the economics world with the Kaldor-Hicks criterion—places stress on allocative rather than distributional issues. See Jules Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 Cal. L. Rev. 221 (1980).

²⁸³ See supra text accompanying notes 194-97. In other words, there appears to be a weak presumption in favor of requiring the transfer payment.

²⁸⁴ See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165, 1214-18 (1967) (discussing “demoralization costs” in a utility context).

others—integrated with competing principles and policies might yield recommendations for handling legal conflicts over intangible products. The unifying device for the demonstration will be a proposed set of minimum constraints, in which enforcement of the restitutionary principle is conditioned upon satisfaction of the various other considerations that the preceding sections have brought to light.

III. SET OF MINIMUM CONSTRAINTS

What factors are relevant to deciding that a plaintiff's claim of "unjust enrichment" entitles her to recoupment? Voluntary action by the defendant is obviously one factor. Whether the benefits are traceable to their origins might be another. A third might be whether the plaintiff obtained a nonreciprocal benefit. Regarding the third factor, if over time the benefactor likely will receive similar benefits from other people, fairness might be served even if she has no right to sue for recompense (and administrative costs thereby might be saved in the bargain).²⁸⁵

The Article here articulates a set of criteria that, when present together, ordinarily will satisfy both the party-oriented and market-preservation concerns. I present them as if I were defining a set of necessary (but not sufficient) elements in a cause of action²⁸⁶ for misappropriation based on unjust enrichment. Three qualifications should be noted.

First, my project is to outline the several conditions that a plaintiff should be required to satisfy to have a valid reap/sow claim. Satisfying these conditions, however, does not ipso facto entitle a plaintiff to relief; rather, a plaintiff merely has demonstrated that one particular reason counts in her favor. Intellectual products often implicate important normative concerns not found in restitution case law, which may justify placing further limits on a producer's claim. The

²⁸⁵ *Id.* at 1223. Of course, considerations other than fairness may mandate compensation even in the presence of reciprocity. See, e.g., *id.* at 1223-24 (arguing that utilitarian considerations sometimes weigh in favor of granting payments that a pure fairness approach might not require).

Mere reciprocity does not guarantee productive behavior. Persons in the classic tragic common each may be in a position to harm the other; creating a regime of exclusive legal rights may preserve their reciprocity but productively redirect their efforts. (I am indebted to David Friedman here.)

²⁸⁶ Because restitution is governed primarily by state law, I use the term "cause of action" rather than the modern federal phraseology "claim to relief."

set of constraints refers to the existence of such other considerations but does not define them exhaustively. Because our jurisprudence has not yet evolved to the point where these other normative issues can be resolved satisfactorily, I am not supporting misappropriation even with the addition of the proposed set of constraints.

Second, note that I rename the tort. The term "misappropriation" has an unfortunately proprietarian ring. It would be truer to the tort's origins to give it a name more reflective of its relational nature. One might use the older term, "unfair competition," but as that is quite broad, I suggest the name "malcompetitive copying."

Third, I present the minimum elements of a tort of malcompetitive copying as if the cause of action arose in a world *without* established intellectual property rights. In the real world, much that is covered by this cause of action would be protected or preempted by the copyright and patent statutes. Parallels between what the cause of action recommends and what existing intellectual property statutes actually provide will suggest the extent to which the statutes are consistent with the common law of restitution²⁸⁷ and the significance of the ties between the two areas. Space does not permit, however, a complete canvass of these linkages.

A. *The New and Slimmer Tort: Malcompetitive Copying*

In summary form, the set of minimum constraints that should limit any common law protection for intangibles premised upon a restitutionary foundation follows:

A defendant who has violated no independent right shall not be subject to suit based upon his or her use of an intellectual product created by another unless:

- (a) he or she knowingly copies an eligible intangible;
- (b) in a context exhibiting asymmetrical market failure;

²⁸⁷ A common criticism of intellectual property doctrines such as copyright and patent is that they are sports, "queer branches of our jurisprudence" that exist only by virtue of "an exception depending on statute." Kenneth B. Umbreit, *A Consideration of Copyright*, 87 U. Pa. L. Rev. 932, 932 (1939). In another context I have taken issue with this position, demonstrating the consistency of copyright with common law patterns. See Gordon, *Inquiry Into the Merits*, *supra* note 37, at 1437-38, 1354-65. Part of my argument suggested that copyright's distributional baseline is consistent with that of restitution and that many other aspects of copyright are also consistent with the restitution case law. See *id.* at 1455-60.

- (c) takes sales from plaintiff's actual or expected market; and
- (d) the use is of a type and amount not likely to be equivalently valuable to the plaintiff over the long run.

These might be considered requirements of (a) knowing use, (b) asymmetrical market failure, (c) competitive nexus, and (d) nonreciprocity. In addition:

An "eligible intangible" is a product that is:

- (e) deliberately created or produced by a person or other legal entity in excess of legal duty and with an expectation of either reward or control; and
- (f) clearly bounded and marked as owned, or that is used in a context where the defendant has the knowledge that proper demarcation would have provided; and
- (g) otherwise suitable for trading in a market context where the seller's leverage is provided by a judicially imposed duty.

The first two requirements for an eligible intangible—(e) deliberate production in excess of a legal duty and (f) demarcation—form part of the internal boundary marking the limits of an appropriate reap/sow claim. Together with constraints (a) through (d), these conditions, when satisfied, entitle a plaintiff to claim that the restitutory impulse weighs in her favor.

The third eligible intangible condition is (g), other suitability. This presently open-ended condition significantly differs in that it includes the many conceivable independent reasons capable of *defeating* the restitutory claim. For example, a nonreciprocal and intentional use of another's eligible intangible should be privileged if the use would serve significant First Amendment goals, or perhaps if enforcement costs would be prohibitively high. Constraints (a) through (f), by contrast, reflect solely the limits implicated by the law's treatment of benefits in general, and by the corrective justice model I developed earlier by reference in part to the "benefits" case law.²⁸⁸

That independent values may defeat a *prima facie* corrective justice claim should be no surprise. In torts, for example, innocent injured plaintiffs often are left remediless by immunities, privileges, and limi-

²⁸⁸ See *supra* Part I.D.

tations of causation and duty.²⁸⁹ Although condition (g) is a necessary element, at present it is largely a black box, indicating the need for further articulation of policy and for attention to particular contexts. Until (g) is fleshed out—and our case law and commentators have begun this task—the tort of misappropriation or malcompetitive copying will remain a highly dangerous judicial tool.²⁹⁰

Taking the constraints one by one, the following section provides an overview of how such a cause of action might operate²⁹¹ and the nature of its potential justifications.

B. Substantive Provisions Examined

1. Explanation of “Violated No Independent Right”

This set of constraints does not apply to causes of action premised on rights other than a restitution-based right against copying *simpliciter*. Grievances growing out of breaches of fiduciary duty or breaches of contract would be free of these constraints, for example.²⁹² Moreover, the constraints do not negate the possibility that rights in intangibles premised on grounds other than reap/sow arguments might exist. Such other rights would have their own rationale.

2. Explanation of “Knowing Use”

The requirement of knowledge serves the two party-oriented considerations of fairness: avoiding harm to the defendant and preserving his autonomy. One who knows he is about to use something that bears a price tag and nevertheless chooses to do so presumably values the use more than the money he will have to pay for it and exercises

²⁸⁹ Recall that conditions (a)-(f) merely state the grounds upon which it is appropriate to enlist a particular type of moral/legal reasoning in the plaintiff's favor. Thus, just as satisfying conditions (a)-(f) may not avail a plaintiff who still fails to satisfy condition (g), it is possible that considerations other than reap/sow could give rise to a plaintiff's claim even where conditions (a)-(f) are not satisfied.

²⁹⁰ At the close of this Article, two examples applying the set of constraints illustrate the importance of condition (g). See *infra* text accompanying notes 456-62, 475-85.

²⁹¹ The specification of the appropriate remedy for this cause of action will require additional investigation. I have suggested doubts about the desirability of injunctive relief, see *supra* note 171 and accompanying text, and offer some tentative suggestions about monetary measures, see, e.g., *infra* note 295, but full investigation of the remedial question is beyond the scope of this Article. A preliminary investigation is offered below. See *infra* text accompanying notes 412-36.

²⁹² I put aside here the difficulty of determining how to classify the borderline cases.

some choice and control over his life. By contrast, a beneficiary might suffer a net harm if he were required to pay for unwanted benefits thrust upon him.²⁹³ One cannot afford to buy everything that has positive value in the market.²⁹⁴ Further, being required to pay for goods and services one has not ordered arguably infringes one's autonomy. Only if the defendant knows that he is about to use something owned by another for which the owner would request payment (and note that an "eligible intangible" must be demarcated as owned under requirement (f)), will he be able to defend himself from unwanted incursions into his pocketbook.²⁹⁵ The defendant's choice

²⁹³ See Restatement of Restitution, *supra* note 152, § 40 cmt. a (recipients of services may be free of obligation to pay because they lack "the opportunity of return" and they derive "no definite and certain pecuniary advantage" from the putative benefit); Levmore, *supra* note 38, at 75-76; Wade, *supra* note 174; *supra* notes 67-77 and accompanying text; see also Jessica Litman, *supra* note 21 (arguing that intellectual products that "seep into" one's consciousness should not be treated the same as those that are initially encountered with a knowledge of their ownership and a choice as to exposure).

²⁹⁴ See Levmore, *supra* note 38, at 74-79.

²⁹⁵ Arguably, the knowledge and demarcation requirements standing alone are insufficient to protect a defendant from unfair surprise because a potential user who sees a "do not copy" warning may still be in doubt as to whether the law will enforce this prohibition.

For example, the intangible's creator will not be able to sue a copyist successfully unless he can show, among other things, that he faced market failure (requirement (b)) and that the item is "suitable for trading in a market context" (requirement (g)). Yet, the potential user may not have the facts available from which to assess the market failure requirement and may not be able to forecast the court's decision on the normative issue of market suitability. The potential user thus remains uncertain as to whether he is copying an eligible intangible over which a creator may assert a right.

If so, this may suggest that the first time a particular type of intangible is sued on, the court should be particularly careful to tailor its remedy in a way that avoids harming the defendant. So, for example, if the defendant already has begun an enterprise utilizing the plaintiff's product, the court should decline to give injunctive relief and should use as its measure of monetary relief a comparatively modest measure, such as the *ex ante* fair market value of a license. For later offenses, conceivably a more heavy measure should be used to preserve incentives to use the market. See *Iowa State Univ. Res. Found. v. American Broadcasting Co.*, 475 F. Supp. 78, 83 (S.D.N.Y. 1979). One example might be a proportional award of those defendants' profits attributable to use of the plaintiff's work. See, e.g., *Sheldon v. Metro-Goldwyn Picture Corp.*, 309 U.S. 390 (1940) (ruling that despite the lack of mathematical certainty, a rule of apportioning profits may be applied).

If for institutional reasons the court desires not to "make markets" via its own setting of prices, see Gordon, *Fair Use*, *supra* note 28, at 1622-24, allowing the defendant free use might be an appropriate way to avoid inflicting chill on potential creators of derivative works. This is not terribly unusual; courts long have felt free to declare prospective rules, binding for the future but inapplicable to the parties before it. Admittedly, such a course has the danger of making plaintiffs less likely to sue on new variants of the cause of action because of a fear they might not collect. One solution to the dual need—to preserve plaintiff's incentives to sue, and

to use an owned product that is marked clearly with a tag indicating the likely price vitiates most arguments that he would be *worse off* after paying the plaintiff than he would have been had he not used the product at all.²⁹⁶

The requirement of knowledge also is tailored to the societal goal of preserving markets. Only a defendant who knows that he will be using an intangible in which another claims an interest will have the ability to seek the creator's consent before using it.²⁹⁷ In other words, such a defendant can purchase an intentional use through the market. The set of minimum elements addresses persons who depart from the market without excuse²⁹⁸ and thus encourages the use of an institutional structure (the market) that has distinct advantages over the courts as a forum for setting prices and allocating resources.²⁹⁹

to constrain the chill of new anticopying decisions—might be for the court to declare a new rule, to make it inapplicable to like behavior that already has occurred prior to the rule's announcement, but to make the rule applicable to the particular defendant before it so that the plaintiff can collect a significant sum. See *Kelly v. Gwinell*, 476 A.2d 1219 (N.J. 1984). This approach has its own difficulties, of course: its fairness can be questioned, as can its ability to constrain the chill on creative use of existing works.

It also could be argued that the task of regulating intangibles should be left to legislative rather than judicial hands, for the legislature is much more able to provide advance specifications that will define classes of protected intangibles and categories of actionable copying. Such a suggestion would not be inconsistent with the current project and in fact is a position advanced in the conclusion of this Article. See *infra* Conclusion. In presenting the set of minimum constraints as desirable, I do not mean to suggest that the judiciary is the institution best suited to implement them.

²⁹⁶ This would violate the Lockean proviso. See Gordon, *Equality*, *supra* note 64. Persons who have begun to rely on the use of certain resources may develop a property-like reliance interest in this continued availability. Cf. Joseph W. Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 611, 663-78 (1988) (arguing that the legal system often protects the more vulnerable party in an ongoing relationship from injury caused by a dissolution by the stronger party); see also Litman, *supra* note 21, at 1015 ("A rule requiring authors effectively to forget the facts learned from other authors would be destructive and impossible to enforce.").

²⁹⁷ See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972). If the defendant, despite his knowing use, does not have a realistic opportunity to bargain with the creator, he will be free of restitutionary claims because of the requirement of asymmetrical market failure, under which a market failure experienced by the defendant counts as a defense. See *infra* text accompanying notes 311-35.

²⁹⁸ Ignorance is only one type of market failure. See Gordon, *Fair Use*, *supra* note 28, at 1614-15, 1627-35 (discussing other types of market failures and their relevance).

²⁹⁹ See generally Calabresi & Melamed, *supra* note 297 (presenting a framework by which entitlements are protected by property, liability, or inalienability, rules). By contrast, a defendant who does not know he is using an owned product cannot seek to purchase it, and allowing the producer to sue him will not encourage markets to form. Admittedly, allowing

A troubling aspect of this element is that it prevents the courts from “making bargains” in some cases where such action might be economically desirable. If, for example, a producer’s ability to stay in business depends on her being entitled to obtain recompense from innocent infringers, under my rule her business will fail even though it generates more overall benefits than costs. I nevertheless choose this route because suing innocents—particularly those who have intermixed their own resources with plaintiffs’—can be unfair and can run afoul of the party-oriented fairness concerns of corrective justice and of the restitution cases.

In any event, the element has an economic side effect that may outweigh the occasional loss of incentives to producers—preservation of an amount of freedom for creative persons who otherwise might be chilled through fear of lawsuits.³⁰⁰ Limiting the remedies for unconscious copying, or requiring proof of a knowing use as a precondition for recovery, would help to preserve a vigorous creative environment.³⁰¹

The rule I propose does not follow the “property” pattern. In real property any volitional unconsented entry on land is actionable in trespass, even if the entrant reasonably believed he was on land upon which he had permission to stand.³⁰² Similarly, in copyright an

suit against innocent infringers might have indirect benefit in encouraging some innocents to become less so—it might spark them to research the question of what is owned and by whom. The rule could be tailored to treat differently persons who deliberately remain in ignorance and those who have no means of learning the needed facts. Nonetheless, making the right to sue valid against innocent infringers would be unfair and, I would guess, unlikely to encourage significant use of the market.

³⁰⁰ Demarcation alone would not avoid the chill, for one unknowingly or unconsciously can copy a work that bears a proper notice on all its authorized copies.

The argument might be made that any economically desirable “new use” will be able to pay its own way so that any one society would “want” to encourage will have nothing to fear from lawsuits. That is, it might be argued that no exemption for innocent infringers is needed. Such an argument would proceed by contending that anyone whose derivative work is economically efficient still will have net positive receipts even if he is required to pay a license fee, or even an allocable share of his profits, to the creators of works he innocently utilized; thus, fear of lawsuits would not deter efficient behavior. One must recognize, however, the many forms of market failure that may place less revenue in a user’s hands than her actual service to the public might warrant. See Gordon, *Fair Use*, *supra* note 28, at 1614-15, 1627-35; Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1042-43.

³⁰¹ See Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1028-32 (evaluating the “subconscious copying rule” of copyright law).

³⁰² Restatement (Second) of Torts §§ 163-64 (1965).

awareness that one is infringing is not essential to liability.³⁰³ My primary reason for departing from the property model is the dependence of the reap/sow notion on bounded notions of causation and desert, linked with the need to accommodate the legitimate interests of *both* the defendant and the plaintiff. Suits against innocents are hard to defend as fair when one of the bases for the cause of action should be the *absence* of any ground for objection on the defendant's part.³⁰⁴ Thus, whatever the arguably desirable economic consequences of the way trespass and copyright law treat an innocent defendant's reasonable mistake, those models are not followed here.

Also note that the first element requires copying as well as knowledge. The essence of that requirement is that the defendant must have borrowed something *from the plaintiff*.³⁰⁵ One who sees an innovative dance troupe perform and memorizes the choreography copies when he recreates their steps on his stage; had he happened to create that same sequence independently, he would not be liable. In this, the set of elements follows copyright law (in which "independent creation" negatives any cause of action) rather than patent law (in which the patentee can sue even independent inventors of the patented product or process).³⁰⁶ A later but independent inventor should not be subject to restitution-based suit by the first inventor where he has not *benefited* from her acts.³⁰⁷

Imposition of a knowledge requirement may seem superficially inconsistent with the unjust enrichment cases that do not require that the beneficiary knowingly have chosen to avail himself of the benefit.

³⁰³ 2 Goldstein, *supra* note 22, § 9.4.

³⁰⁴ See *supra* note 197 and accompanying text.

³⁰⁵ The cause of action does not yet specify what kinds of borrowing should be forbidden. The discussion proceeds as if at least the following are within the scope of the new cause of action: copying by reproduction, by the making of derivative works, by public performance, and by public display. Cf. 17 U.S.C. § 106 (1988) (listing copyright owner's exclusive rights in such activities). Thus, in addition to further specification of the content of element (g), adoption of any misappropriation or malcompetitive copying tort requires a better definition of copying than now provided either by the cases or by this first try at a sophisticated definition of the tort. For example, should mere reference to the plaintiff's work, without reproduction of the work, count as actionable if the reference allows the defendant to free ride on the reputation of the plaintiff's work? My instinct is that it should not count as actionable, but full investigation of that issue has to be put aside for another time.

³⁰⁶ I am indebted here to Marian Coase.

³⁰⁷ The Article does not intimate a view on whether suits based on other considerations (e.g., pure economic incentive arguments) would be appropriate.

These are often cases, however, where *other* means are present to safeguard the beneficiary's interests. For example, in the case of the unconscious accident victim given aid by a medical professional, there can be little doubt that the patient would have wanted the assistance.³⁰⁸ For another example, consider the debtor who mistakenly overpays his debt. When restitution law is used to make the creditor disgorge the benefit, the lack of valuation problems (a dollar is a dollar) gives assurance that the creditor will not be made worse off than he was in the status quo ante by being required to repay the overage.³⁰⁹ It is hard to see how preventing the creditor from keeping an amount of money that is more than he expected to receive would interfere with his life plan in any significant way.³¹⁰

In the area of intellectual products, however, unlike these unjust enrichment cases, the relevant factual context provides no such convenient substitutes. We all use ideas, symbols, and processes that we did not invent ourselves, and being sued after innocently basing whole projects on these inevitably borrowed elements would be likely to interfere significantly with our life plans. Also, valuation here is a difficult issue. Requiring as a precondition for suit that a defendant knowingly have chosen to copy something that he knows bears a price tag seems to be a minimal requirement to assure some respect for the defendant's autonomy and to protect him from being made worse off by plaintiff's suit than he would have been had the "benefit" never been utilized.

Even the knowing use requirement may not provide sufficient protection for defendants. One willingly may purchase and read a book labeled "Do not copy without payment," learn what that book has to teach, and only afterward realize that the book has changed his way of thinking—he cannot help but copy its images to utilize what it taught him—but he cannot afford the price tag for this additional use. An additional privilege of use might be required to accommodate such cases.

³⁰⁸ See *supra* text following note 151 & notes 216-19 and accompanying text.

³⁰⁹ See Birks, *supra* note 202, at 109-12; cf. Levmore, *supra* note 38, at 77 ("a recipient may genuinely not want a benefit that is forced upon him").

³¹⁰ When an obligation to return a mistaken payment does threaten to cause such interference because the recipient has changed his position in reliance on the income, restitution law often will relieve him of the obligation to repay. See 3 Palmer, *supra* note 153, § 16.8, at 523-27.

3. *Explanation of "Asymmetrical Market Failure"*

"Asymmetrical market failure" refers to those cases in which the plaintiff, but not the defendant, faced barriers precluding use of the market. Both components of this requirement might be satisfied, for example, if the creator has no practicable means of identifying who is using her work but the persons using it know the creator's identity and address.

The requirement will not be satisfied if the plaintiff could have located the defendant, had some practical means of denying him access to the work until payment was forthcoming, or otherwise could have consummated a contract with him if use of the intangible were worth more to the defendant than the plaintiff's reservation price. The requirement also will be unsatisfied if the defendant practicably could not have sought out a contract with plaintiff.³¹¹ Failure of either component would bar the plaintiff's suit.

Arguably, both components are extensions of established restitution doctrine. Commentators, particularly in the literature on intermeddlers and volunteers, stress that benefactors who *could* have bargained in advance, but did not, will be considered officious and will not be permitted to use the courts to extract payment after the fact.³¹² This view can be justified on both fairness and economic grounds.³¹³ The requirement that the plaintiff face a market failure responds to the economic concern about eroding markets.³¹⁴ It seeks to assure that the plaintiff will have a restitutionary cause of action only where she had a good reason not to seek consent and where granting a right of action will not undermine the existence of markets that otherwise would evolve.³¹⁵ As for fairness, using a court is a mode of compulsion, and if a plaintiff could have contracted in advance but failed to do so, she arguably has infused more compulsion into the situation than necessary.

³¹¹ See Gordon, Fair Use, *supra* note 28, at 1614-15, 1627-35 (discussing market failure as a defense to copyright infringement).

³¹² See, e.g., Hope, *supra* note 174, at 25-29, 205, 242; Wade, *supra* note 174, at 1183-84.

³¹³ See *supra* notes 198-212 and accompanying text.

³¹⁴ See Levmore, *supra* note 38, at 79-82 (denying restitution to volunteers encourages a "complex, thick market" "of many active buyers and sellers").

³¹⁵ Of course, there may be proof problems here. Tom Palmer suggests with some force that lawyers show less imagination than do market participants about ways to overcome market barriers. See Palmer, *supra* note 131, at 287-302.

The second component of the test—that the defendant *could* bargain with the creator of the intangible—responds to an economic concern with saving judicial resources.³¹⁶ In some instances a right of action, addressing its inmonitory force as it does to defendants, can encourage them to seek market bargains.³¹⁷ In others, defendants have no realistic prospect of purchasing what they need in the market. The requirement that the defendant *not* have faced market failure avoids placing the entire matter of payment for intangibles in the judicial lap.³¹⁸ This accords with fairness considerations. Although

³¹⁶ See, e.g., Restatement (Second) of Restitution, *supra* note 127, § 2 cmt. a; Dawson, *supra* note 13, at 1418 (“Absent some special reason for intervening, abstention by courts seems wise, especially if the activity is so common . . . that the scale of the intervention would probably have to be vast.”).

The restitution courts do not go so far as to allow any form of market failure to negate “officiousness.” To the contrary, in the absence of elements such as mistake or request, very particular circumstances, such as a dire emergency, must be present before a volunteer is permitted to collect. Here I allow the active role of the defendant to compensate for the strictness of the volunteer cases.

³¹⁷ This has implications for the question of remedy. What kind of monetary or coercive remedy will encourage a largely self-perpetuating market to evolve? Monetary remedies in an amount equivalent to the product’s “value in advancing the purposes of the recipient,” Restatement of Restitution, *supra* note 152, § 155, may be sufficient to induce defendants to make contractual arrangements for licenses if licenses will cost them less than a litigated judgment. An injunctive remedy might be necessary, however, to foster a self-regulating market, which could create tensions with the desire to protect defendants from harm.

³¹⁸ This element of defendant’s market access also has allocative effects. Some of these are positive. It could be costly for the tort to impose a payment requirement in instances where market failure disabled defendants from purchasing licenses. Depending on how the monetary remedy was structured, in such instances the tort might discourage some important and economically valuable uses from going forward. Inclusion of the market access element prevents the malcompetitive copying tort from blocking such desirable uses.

Yet the element has two negative effects on resource allocation as well. First, implementation of a market failure defense may result in some plaintiff-creators having fewer incentives than they would have obtained had a market been operating. Even desirable commercial users should pay something for what they borrow; when a creator’s product produces foreseeable monetizable benefits in another’s hands, the creator should be able to internalize some of that income stream. Second, the failure of the market to give accurate information about value conceals not only uses that produce a positive net social product, but also those uses that impose a net societal loss. The element makes it possible for defendants whose uses should be discouraged to be immune from liability if they face market failure.

At some point it may appear that the allocative costs attributable to the absence of incentives are greater than the transaction costs of having the judicial system impose liability. Assuming fairness considerations are not traversed, it may then be appropriate to modify the element relating to defendant market access. At such a point, proof of a commercial defendant’s market failure should work not to defeat liability, but rather to affect the measure of recovery. Because such a defendant is able to pay, but could not have proceeded through the market, the court should require him to pay no more than a “reasonable royalty,” an

requiring the defendant to pay may be unfair if he could not have proceeded through the market, it may be both fair and economically wise to encourage him to proceed through the market where feasible. Thus, the two components that together constitute the requirement of asymmetrical market failure not only preserve existing markets, but also encourage new markets to form. In sum, although restitutionary rights deter market formation in the typical volunteer setting,³¹⁹ they encourage markets in the typical intellectual product setting. This difference explains the preference of a no-liability-for-labor rule in the volunteer context, and the preference for a liability-for-labor rule in the intellectual product context.

These differing preferences can be traced in turn to superior access to information. In each case, the party with the information is given the incentive to use it. In the volunteer context, that party is the benefactor, at least where mistake and other exceptional situations are absent. The rule of no liability encourages the volunteering house

amount equivalent to what he would have paid had he been able to go through the market. This is in contrast to the measure of monetary remedy I suggest for the tort generally, which would impose a significantly higher amount in order to discourage market bypass. See *infra* Part III.C.

An alternative method of avoiding allocative losses is to retain defendant market failure as a ground for defeating liability, but to make that ground operative only in cases where the defendant's use constitutes a desirable project (e.g., it generates more benefits than costs) and free use would not substantially undermine incentives. This is the route I have proposed in the copyright context. See Gordon, *Fair Use*, *supra* note 28, at 1615-22.

³¹⁹ In the typical volunteer case, the volunteer (the future plaintiff) knows what she is about to do and is in the best position to make a bargain about it. A volunteer who knows a right of action is available may not seek out the beneficiary's advance consent. Even within the volunteer area, however, there can be occasions when granting restitutionary rights will not inhibit markets. On those occasions, the law is more likely to give restitution. See Levmore, *supra* note 38, at 79-82 (discussing "market encouragement" as one of the rationales influencing the court in the restitution area).

painter and other such benefactors to seek out contacts with potential recipients.³²⁰ Any other rule actively discourages market bargains.³²¹

In the intellectual property situation, the opposite pattern prevails. There, because of strategic behavior and the distribution of information, a rule of no liability would be the one that would impede the formation of markets. The creator may not be able to identify the audience prior to publication. As a result, a creator who wanted to respond to a rule of no liability by making bargains with potential recipients might be unable to do so. Even after the work is in circulation, the difficulties persist. It is the copyist (the future defendant) who knows what he is about to do and who is in the best position to make a bargain about it. For example, only the copyist knows how many copies he intends to make of what work; the creator may not even know the copyist exists.

The law should influence the copyist rather than the creator at this stage. Because a copyist likely will attempt to bargain only if he thinks that unconsented use will result in liability, and because only the copyist can initiate bargaining in response to a legal rule, only a rule that imposes liability upon the copyist will encourage bargains and allow creators to internalize some of the benefits they generate.³²²

³²⁰ If information is distributed in such a way that only a potential plaintiff can react to a rule of law by contracting around it, then, other things being equal, a no-liability rule is preferable. Without a legal right to obtain payment via the courts, a potential plaintiff instead will bargain in advance with the recipient. This is the volunteer case. See Calabresi & Melamed, *supra* note 297, at 1106-10.

If information is distributed in such a way that only a potential defendant can bargain around the applicable legal rule, then, other things being equal, a rule imposing liability is preferable. Such a rule will better motivate a defendant to seek out consensual bargains than will a no-liability rule. *Id.* This is the intellectual product case.

³²¹ If restitution suits were available to volunteers, they could choose between suit and consensual bargain. Volunteers who fear recipients will refuse what the volunteers have to offer might prefer the lawsuit route, because with judicial compulsion the volunteer need not worry about the recipient refusing to pay. Volunteers who expect recipients to be willing to pay likely will prefer face-to-face negotiations because that is less expensive than litigation.

Conceivably, the law could respond to this not by a blanket refusal to give restitution, but instead by conditioning a volunteer's recovery on her good-faith effort to proceed via the market. Cf. Long, *supra* note 130, at 415, 420-22, 427-28 (arguing that a hypothetical contract should be imposed only where high transaction costs "preclude negotiation of an express contract").

³²² In addition, exchange is more feasible when an entitlement is held by a closed class of individuals—for example, an author holds a right over copying—than by an open class—for example, all potential users are entitled to copy. See Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 *J. Legal Stud.* 321, 324-25 (1985).

A potential copyist who knows that he risks hefty liability for copying without permission may be willing to disclose his identity and seek a license.³²³ This possibility helps to justify a rule imposing liability in intellectual property cases, so long as the copyist himself does not face market failure. Thus, restitutionary rights for intellectual products cure a market failure caused by information asymmetries and the possibility of strategic behavior.³²⁴

Courts may appropriately refuse to investigate whether market arrangements are impracticable in the ordinary volunteer cases, in which a closed-door policy may encourage internalization by contract in those instances where it is feasible. Where consensual bargains cannot be reached in a definable *class* of cases—as, arguably, such bargains cannot be achieved in most intellectual property contexts—then the law's refusal to intervene is less justified.

Differential access to information is not the only systematic difference between the paradigm volunteer cases and the typical intellectual property cases. Consideration of other sorts of transaction costs, and of strategic behavior, shows that the analysis reaches the same result even where the intellectual property producer possesses adequate information.

In the paradigmatic volunteer cases where restitution is denied, the recipients are identifiable in advance and usually are limited in number. Bargaining is likely to be fairly easy in such contexts. If locating a hotel nearby will benefit a landowner, for example, then an accommodation should be reached without undue difficulty in which the landowner pays the hotelier to encourage her to build the development in his area.³²⁵ Similar accommodations often occur in regard to drilling for oil, where neighboring lessees stand to benefit from each other's exploratory efforts. Such entities often sign "dry hole agreements": if one drills and the hole comes up empty, the next-door

³²³ Of course, there is the possibility that even with liability, a copyist will copy without permission in the hope that he will not be apprehended. This introduces familiar questions about the advisability of including deterrence considerations when determining compensation and penalties. But a copyist who reaps significant market success is likely to be spotted and apprehended eventually. For a discussion of remedy, see *infra* Part III.C.

³²⁴ For a fuller discussion of the ways that intellectual property rights encourage markets, see Gordon, *Fair Use*, *supra* note 28, at 1610-14. Note that although rules forbidding copying cure these types of market failure, they can create a new set of market barriers. See *id.* at 1613, 1614, 1627-35.

³²⁵ See Fried, *supra* note 172, at 46.

neighbor will have obtained valuable information that may save him the fruitless expense of drilling his own hole. Knowing this, he agrees in advance to pay a share of the costs of drilling the hole should it prove dry.³²⁶

Thus, one might guess (as one suspects the courts have) that in most of the volunteer cases a recipient contacted in advance would have been willing to pay *if* he truly would have benefited from the plaintiff's offer. The volunteer's choice of litigation over advance bargaining is suspicious: it suggests that the volunteer feared the recipient would not have paid the plaintiff's price for the benefit.

Potentially, however, a recipient will refuse to pay even if he values the benefit at more than the price demanded. For example, a landowner in an area of potential development may want a hotel to locate near him but may suspect that the hotel will do so even if he pays nothing. In this game of "chicken," the landowner may gamble on the hotelier's continuing without his contribution. If he wins his bet, then he gets something for nothing. If he loses and the hotel developer cannot or will not build without the neighboring landowner's contribution, then both lose out on a development that may have been to their mutual advantage. Alternatively, the developer might try to effect internalization by purchasing the nearby land on which beneficial spillovers might fall. But the neighbors might refuse to sell.

Therefore, even in the realm of tangible property, a benefit-generator (the "benefactor" or "creator") sometimes cannot recapture the benefits through voluntary interaction. If strategic behavior lies at the core of the benefactor's problem, and if the behavior precludes value-maximizing resource uses, then perhaps a court should order payment via restitution.³²⁷ Benefactors may be less diligent in recouping benefits, however, if they think a court will do it for them. A court may have difficulty policing whether a benefit-generator has made a good faith effort to proceed through the market. Keeping this judicial door open may erode the much-preferred voluntary system.

³²⁶ E.g., 7 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 140.1, at 207 (1979). The agreements typically provide that if the well strikes oil, a lesser payment or no payment is required. Despite an equally beneficial spillover of information in the second situation, the parties appear to treat the oil as sufficient harvest for the first driller. See *id.* § 140.1, at 121 (Supp. 1990) (by implication). (I am indebted to Allen Axelrod here.)

³²⁷ See Long, *supra* note 130, at 428.

The desirability of keeping the door open to the possibility of restitution may depend on whether the creation of incentives for a feasibly defined class of cases requires it. From the incentive perspective, a benefactor need not receive payment so long as she, and persons like her, would generate the benefits regardless of the availability of restitution from beneficiaries. In many restitution cases where relief is denied, the plaintiffs have sufficient motives of their own for engaging in the activities.³²⁸ The court may presume that because the person seeking payment already has engaged in the valuable activity, incentives are irrelevant.³²⁹ But a substantial class of persons may exist who are *like* the plaintiff but have not yet engaged in the valuable activity and would do so if restitution were assured. The court may not know of their existence. The varying fact patterns of different volunteer cases may complicate generalizations across classes of activities or predictions about categories of behavior.

But what should a court do when, as a recurrent pattern, a class of otherwise desirable activities clearly will not be undertaken unless restitution is available? If such classes of activity can be identified, then perhaps some preference for restitution is in order,³³⁰ justifying an open door to the inquiry into whether a market failure makes the benefactor's failure to obtain advance consent not officious.

Intellectual products provide an area where such an open door may prove worth its expense. Most such products share common characteristics. For example, the recipients typically are many and the benefits neither tangible nor certain, unlike the usual one-on-one situation in the volunteer context, so that transaction-cost and strategic-behavior problems (like the "chicken" problem) grow in significance. For intellectual products, the potential recipients are a far-flung audience, and the benefits are those that will flow from an as-yet-undisclosed

³²⁸ See Dawson, *supra* note 13, at 1410.

³²⁹ Thus, in the restitution area, courts may be tempted to take an *ex post* rather than *ex ante* approach. On the difference between these approaches, see Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 5-14 (1984).

³³⁰ In those cases where a pattern is discernible—as there arguably is in cases involving emergencies—the restitution courts do seem to respond. See Restatement of Restitution, *supra* note 152, § 116. The need for positive incentives and the desire to minimize transaction costs by preserving markets are equally important as an economic matter. Where markets can be preserved and incentives simultaneously served by judicial intervention (as in emergency need for medical care, or arguably, intellectual product creation), the case for judicially imposed duties is strong.

intellectual product. As a result, bargaining may founder, even among rational actors.³³¹

In a world without intellectual property rights, an author may want to bargain with her audience for payment, but the audience is likely to be a wide and uncertain one. Even if the author somehow could identify all the potential recipients, it would be expensive and awkward to reach simultaneously³³² all of the persons who eventually would want access to the work. Even if this were possible, what will happen when the creator tries to negotiate for a payment from the whole class of users in exchange for disclosing the work? Many of those audience members might be tempted to hold out in the hope that others' monies would draw the work into the marketplace.³³³ The larger the group of potential purchasers, the better the gamble may seem. Also, the work's contents are largely unknown at this stage; the less certain the benefits, the less seems to be risked if the gamble does not pay off. With good odds in favor of winning and a perceived low cost in the event of a loss, the gamble becomes very tempting. If enough people take this gamble in the hope of getting a free ride, the requisite funds may not be forthcoming.³³⁴ This result may disserve the interests of

³³¹ See, e.g., Gordon, *Fair Use*, *supra* note 28, at 1610-14.

³³² The process must be close to simultaneous because, if it were not, the first customer could sell to the rest.

³³³ This is part of the "public goods" problem. When it is difficult to exclude nonpurchasers from using a good, it is likely to be "under-produced if left to the private market." Gordon, *Fair Use*, *supra* note 28, at 1610-11.

³³⁴ Arguably, a large group will be unable to coordinate itself to overcome this problem unless it can impose duties of contribution on its members, leading the group to impose such a duty on itself. Indeed, if audience members reliably could impose such rules upon themselves, court-imposed rules would be unnecessary. The same gaps in information, transaction costs, and free rider problems that would afflict the author or the publisher would plague a group of audience members in their efforts to solve the problem, however. See Morton D. Davis, *Game Theory* 95-103, 128-31 (1970) (illustrating the low likelihood of cooperation in the presence of a particular pattern of payoffs from free riding). In fact, one can view the legal regime as rules imposed by the audience on itself by the only practicable means.

The same temptation to hold out also plagues land development efforts and is one reason why governments have the power of eminent domain—limited, however, to cases where there is a public purpose. Intervention is even more necessary in the area of intellectual property where the hold-out problem is endemic. Just as eminent domain can solve the strategic behavior problems in land development, a system like copyright can solve these strategic behavior problems among authors and users.

The desirability of a restitutionary right to resolve potential bargaining stalemates does not change much with the introduction of a commercial publisher into the picture. Admittedly, the author may find it easier to deal with a publisher than with an undifferentiated audience (only one party, low transaction costs), but then the publisher must deal with the audience and

the consuming class; they might be better off constraining their opportunity to engage in strategic bargaining if a lack of constraint leads to a lower level of production than they would prefer.

In sum, because of the structure of the volunteer/recipient relation, a no-liability rule speaks best to the volunteer.³³⁵ Because of the structure of the creator/copyist relation, a liability rule speaks best to the copyist. Thus, the same market-encouraging considerations that suggest there should be no liability in the volunteer context suggest there should be liability in the intellectual products context, so long as the facts encountered there fit the usual pattern of a plaintiff who faces market failure and a defendant who does not. Further, a liability system is more necessary for intellectual products than it is for other kinds of resources precisely because creators are likely to face market failure unless they have the leverage of a right of action.

4. *Explanation of the "Competitive Nexus" Requirement*

Examination of whether the defendant's use was among those foreseeable to the intangible's producer when her labor initially was expended might establish the requisite nexus between the plaintiff and the contested use by the defendant.³³⁶ Though perhaps desirable in the abstract, the foreseeability approach might encounter intractable proof problems.³³⁷ In addition, a creator's expectations in part may

the potential copyists in its midst. The author's problems with information, transaction costs, and free riders simply would be passed on one step further down the line. How much will a publisher pay for a book that can be copied lawfully by anyone once it appears on the market? This question is empirical rather than rhetorical. Unless the publisher has real-world clout that can discourage copying, the rate he will offer the author in such a world may be too low. Such leverage can be obtained through physical control or lead-time advantage, retributive or strike editions, gentlemen's agreements, book clubs, and other forms of patron relationships. See Breyer, *supra* note 131, at 294-306; see also Gordon, *Inquiry into the Merits*, *supra* note 37, at 1400-05, 1413-22 (examining such devices); Palmer, *supra* note 131, at 295-300 (envisioning various voluntary market mechanisms that would increase the original disseminator's control over an intellectual product). If such leverage is unavailable and the anticipated rate of payment is low (to return again to the question of incentives), otherwise-desirable works may not be created.

³³⁵ See Levmore, *supra* note 38, at 73.

³³⁶ See *supra* notes 155-64 and accompanying text.

³³⁷ The uncertainty introduced by limiting a creator's recovery to provably foreseeable uses also might work to dilute economic incentives. On both the proof and economic issues, see Gordon, *Inquiry into the Merits*, *supra* note 37, at 1384-85 & nn.192-93. In addition, questions of horizontal fairness may arise if two equally productive laborers are treated differently.

be a function of the law itself. As a proxy for this inquiry, the approach suggested here asks whether the plaintiff *now* stands ready and willing to supply the market served by the defendant's use. If the plaintiff can show she is serving, or shortly will be serving, the defendant's customers, she will have presented an acceptable proof of connection between the plaintiff and the contested use.

This requirement in turn satisfies the restitutionary doctrines indicating that relief should be given only where the defendant's gain is at plaintiff's "expense."³³⁸ Of the cases involving no violation of an established right, judges seem to have the least problem with restitution claims containing both a plaintiff's loss and a defendant's benefit. Consider our prior examples. The doctor who renders aid has "lost" an amount of time and effort expended specifically on the patient's behalf, and the patient has "gained" valuable services.³³⁹ The debtor who overpaid his debt has "lost" an amount of money that is now a "gain" for the creditor. Restitution restores an equality in both situations: the harmed party is made whole by payment from the party with the unearned gain. This is also the paradigm situation offered by Aristotle to illustrate corrective justice.³⁴⁰

The competition requirement works to assure that defendant's gain is at plaintiff's expense³⁴¹ because if the plaintiff is serving, or is about to enter, the market where the free rider is selling elements of the plaintiff's work, then allowing the free rider to continue likely will hurt the plaintiff³⁴² by taking her custo-

³³⁸ See *infra* notes 362-79 and accompanying text (discussing why copying another's intangible should not be considered a violation of exclusive right absent some specification from a source beyond the entitlement not to labor).

³³⁹ A producer of intellectual products also may expend money or effort, but given the inexhaustibility of most intellectual products (they can be used by a potentially infinite group of persons without being consumed) it is less clear than in the doctor/patient case that the investment was expended on the beneficiary's behalf. If the presence of the beneficiary/defendant did not "cause" the investment, it cannot be said to have "caused" a loss. See *supra* notes 133-58 and accompanying text.

³⁴⁰ See Aristotle, *supra* note 78, at 84-85.

³⁴¹ For further discussion of the applicability of the expense-to-plaintiff requirement in this context, see *infra* at notes 342-79 and accompanying text.

³⁴² If the initial creator has no practicable means of selling to those persons served by the copying (because of transaction cost barriers or the like), then it is implausible to say that the copying has harmed the creator in this way.

Because of the reap/sow focus of this Article, my discussion here does not address fully the questions raised by the case of a creator who *could* license (no transaction cost or externality barriers stand in her way) but chooses not to do so. Sometimes a putative user could not meet

mers.³⁴³ This harm to the plaintiff may be severe: because the free

the creator's reservation price because the desired use would impose costs on the plaintiff that the receipts generated by the use could not compensate. If the plaintiff refused to license or to serve the market herself, element (c) of the malcompetitive copying tort would render such a plaintiff unable to sue.

Depending on context, good arguments indeed may exist for not honoring a creator's refusal to exploit a given work. See Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12, at 1042-49. If, for example, the plaintiff wants to restrain a parodic use of her work—she is neither willing to serve the parody market herself nor willing to license others to make versions of her work for this purpose—it often is argued that her refusal should not be honored. Though there may be real economic costs imposed on her if the parody induces a potential audience to cease taking her work seriously, those changes in taste are *not* costs that the law should encourage the initial creator to take into account. See Gordon, *Fair Use*, *supra* note 28, at 1632-35. A certain scope of free use for parodies in fact is seen in copyright law, a statutory analogue to the instant tort. *Id.*

This tort's element (c) is not the only way of dealing with the problem of uses that an initial creator desires neither to exploit herself nor to license. For example, the court might be asked to determine if the fee demanded by a plaintiff as her minimum price for a copy or a license is "reasonable"; if it is deemed reasonable, the court would allow the plaintiff to sue despite her unwillingness to serve, or to license another to serve, the market at a lower price. Or the court could be asked to define considerations that a malcompetitive-copying plaintiff may or may not take into account in setting her reservation price and to allow her to sue, despite a refusal to license, if legally relevant considerations motivated the refusal. For example, a court might decide that the plaintiff could take into account costs from substitution (so the plaintiff could justify her refusal or her high minimum fee by reference to the likelihood that customers would buy the new version of her work instead of the plaintiff's initial version), and that same court might deem legally irrelevant those costs to the plaintiff arising from more personal considerations (so the plaintiff could not count as a good reason for refusal that the licensed use would invade her sense of privacy or that the use would serve an ideological purpose of which she does not approve). Obvious problems with these various solutions exist in terms of practicability and normative acceptability.

This Article suggests that notions of reap/sow themselves do not justify restraints beyond the area of the plaintiff's own harvest. My provisional judgment is that, even from a utilitarian or economic perspective, it is best to use malcompetitive copying, misappropriation, copyright, and other copying-based causes of action only to protect the plaintiff's interests as they relate to substitution effect, and that when other interests are concerned (e.g., privacy) only those laws and doctrines fine tuned to the particular interest implicated by the plaintiff's refusal should apply. Because substitution effects likely will be zero or minimal when the defendant's use addresses markets wholly separate from those served by the plaintiff, I see element (c) as encouraging new uses and users without imposing economically inefficient substitution effects on initial creators. See Wendy J. Gordon, *The Right Not to Use* (unpublished manuscript on file with the Virginia Law Review Association).

³⁴³ Peter Birks suggests that in the absence of a wrong, a defendant who has received wealth from a third party need not respond in restitution unless the plaintiff can show that "the wealth in question would certainly have arrived in the plaintiff if it had not been intercepted by the defendant *en route* from [a] third party." Birks, *supra* note 202, at 132-34; see also *id.* at 138 (providing an example of the theory).

rider does not have to bear the full cost of production, he can undersell the originator.

Arguments regarding fair reward underlie this interpretation of a foreseeability or expense requirement.³⁴⁴ Also, I have suggested that the restitutory impulse may be essentially comparative, resting not only on a perception that beneficiaries are less entitled to keep the benefit at issue than are benefactors (*ceteris paribus*), but depending also on an assessment of the comparative impact that a recovery (or the absence of a recovery) would have on the parties' ability to formulate and implement plans for their lives.³⁴⁵ When the plaintiff is selling without interference in all the markets she intends to reach, she has less to weigh against the interests served by the defendant than she otherwise would.³⁴⁶

This requirement that actual or imminent competition be shown also can be defended by reference to the restitutory principle. Without the competition requirement, the plaintiff would be allowed to use a lawsuit to capture a benefit resulting from something she never would have done herself—she would get a “windfall,” a net gain from the defendant's creative or productive activities in excess of what she would have had in the defendant's absence.³⁴⁷ The restitutory principle condemns reaping without sowing; therefore, allowing the plaintiff to collect such windfalls may be inconsistent with that principle.³⁴⁸ By contrast, the requirement of actual or

³⁴⁴ See *supra* notes 157-64 and accompanying text.

³⁴⁵ See *supra* notes 267-79 and accompanying text.

³⁴⁶ This consideration would suggest that a plaintiff should be required to show that the defendant's copies fulfill a need foreseen by the plaintiff when she initially created the work. Element (c) is less demanding than that, and admittedly this consideration in its own terms may not justify the element (c) approach of allowing a plaintiff to satisfy the competition requirement by a mere showing that near the time of the suit she was willing to serve the market in question, particularly if the new user's efforts brought the new market to her attention. I allow a showing of present or imminent competition to satisfy the competition element largely because making the plaintiff prove her expectations would introduce too many litigation costs and uncertainties—and consequent erosion of incentives. See *supra* note 337 and accompanying text. This easing of the plaintiff's burden also may be defended on the ground of some lingering plausibility in the corrective justice causation argument: as between two parties equally able and willing to serve a need through selling a particular work, the person whose efforts caused the work to exist should be preferred.

³⁴⁷ Windfalls may be appropriate in some restitution contexts, however, as where a defendant has violated a plaintiff's preexisting rights. See *Dobbs*, *supra* note 158, at 224.

³⁴⁸ Arguably, my hypothetical cause of action should apply here as well; perhaps a creator *should* be able to reap without sowing where a user cannot meet the hypothesized minimal

imminent competition assures that the plaintiff will benefit only from her actions or from actions she was about to take before another usurped her place.³⁴⁹ In these cases, an allocable share of the defendant's profit or a payment otherwise keyed to the value³⁵⁰ of what was copied may be an adequate measure of what the plaintiff *would have earned* had the plaintiff engaged in, or licensed another to engage in, the activity that made the defendant liable. This may be a result more consistent with the notion of reaping what you sow.³⁵¹

Admittedly, this rule requiring loss of potential sales may leave some defendants with a gain based in part on the plaintiff's effort. But even if that gain were wrongful, the plaintiff may not have any particular standing to complain,³⁵² at least according to Jules Coleman's interpretation of corrective justice. In his view, nothing in a wrongful gain per se requires the money be paid to a particular person.³⁵³

criteria for a cause of action. (Arguably, the user should have no legal ground for complaint if he were forced to hand over profits in excess of what the plaintiff could have earned on her own, except if he met the proposed tests that I posit as a prerequisite for a court to order a recipient to disgorge.) The tort was crafted, however, to respond to free riding by private actors in the marketplace. The plaintiff who has no intention of selling in the defendant's market can only free ride on the defendant's effort *if* the state acts. The requisite analysis therefore will differ in several respects.

³⁴⁹ Compare Aristotle's references to each party having "his own." See Wright, *supra* note 84.

³⁵⁰ On the issue of how monetary recovery should be computed, see *infra* Part III.C.

³⁵¹ This interpretation is not without difficulty. It might be argued, for example, that the plaintiff's efforts causally contributed to the defendant's profits (in a "but-for" sense of cause), so that giving the plaintiff a right of payment would not be allowing her to reap without sowing. Nevertheless, allowing her to sue would make her *better off* than she would have been absent any interaction with the defendant. In that sense, she might be said to be reaping more than she sowed. Those profits also may exceed most common-sense notions of "cause" and may be outside the range of that for which she may claim "responsibility."

³⁵² A plaintiff unwilling to tend a field where some of her seeds have fallen should not be entitled to complain when another raises the plants to maturity.

³⁵³ Jules Coleman has suggested that though corrective justice dictates that a plaintiff's "wrongful loss" should be remedied and a defendant's "wrongful gains" should be disgorged, it says nothing about *how* to effect these results. See Coleman, *supra* note 54, at 12-14.

Corrective justice dictates that a defendant should disgorge a wrongful gain, but Coleman contends that there may be many fair ways of effecting that disgorgement. For example, the defendant might be required to pay the gain into a central treasury. Similarly, there may be many appropriate sources of compensation other than the person who caused a plaintiff's wrongful loss. Perhaps no-fault insurance can satisfy a plaintiff's corrective justice claim in the tort area. In the intellectual property area, governmental subsidies and grants, and

I need not take that approach here, for I suggest that unearned gains simply do not violate the reap/sow principle unless they somehow interfere with the plaintiff's own plans to utilize the intangible. It long has been argued that a transitive cause of action—where a particular person *Y* owes a duty to another particular person *X*, and *X* has a corresponding right against *Y*—is fairest when *both* a loss (on the plaintiff's part) as well as a gain (on the defendant's part) are present.³⁵⁴ In such a case any imbalance caused by the wrongful act is twice as great as the amount of the harm, or the gain, standing alone.³⁵⁵ Further, granting a cause of action here erases that imbalance and creates no new imbalance. Such cases seem to “present the strongest case for relief.”³⁵⁶ If so, it is fairest to make a defendant pay a plaintiff when the plaintiff somehow is made worse off by the defendant.³⁵⁷ In the realm of intangibles, the competition requirement serves this fairness function. By taking the creator's potential customers, a copier likely will make the creator worse off than she would have been in the copier's absence. Thus, the proposed set of constraints accords with fairness in requiring that a defendant's actions threaten the plaintiff with a particular kind of harm before the plaintiff may sue.

Justification for the competition requirement also has an important societal component. If the two parties are positioned to serve the

academic salaries and prizes, perhaps may be appropriate responses if no suitable defendant is available.

Under such an analysis, a plaintiff who has suffered no loss may have no entitlement based solely on another's gain. Even where the plaintiff *has* suffered a loss, Coleman does not concede that corrective justice dictates a transitive cause of action. He argues that “even when an injurer *gains* through his fault in causing another harm, there is no argument from corrective justice which requires that we impose his victim's loss upon him.” *Id.* at 14. In Coleman's view, providing a transitive cause of action in that context merely has the “fortuitous effect” of “cancelling both” the wrongful loss and the wrongful gain. *Id.*

³⁵⁴ See L.L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52, 56 (1936); see also Aristotle, *supra* note 78, at 84-85 (in the paradigmatic case of corrective justice, injurer gains what the sufferer loses); John P. Dawson, *supra* note 72, at 5-6 (“The translation of loss by one individual into gain for another is felt as an aggravation, multiplying both factors in the equation.”).

³⁵⁵ See Fuller & Perdue, *supra* note 354, at 56 (“If A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.”).

³⁵⁶ *Id.*

³⁵⁷ This usage of “worse off” refers to the same baseline utilized to identify “harm” elsewhere in this Article—how the party would have fared in the absence of the contested interaction. See *supra* notes 187-91 and accompanying text.

same market, then the cause of action is most likely to create desirable incentives. Allowing free riding between competitors to continue unchecked and uncompensated first may destroy the initial producer (the initial "creator" who has paid to produce the intangible) and then destroy the second provider (who as a free rider may lack the know-how or other tools necessary to provide the intangible on his own). Uncompensated free riding eventually may result in unmet consumer needs.³⁵⁸

By contrast, if the two parties serve *different* markets, free riding is less likely to prove destructive. The first producer's plans—and thus her incentives—remain unaffected by the second producer's actions. Also, because the second producer will be serving a market that the first producer did not expect to serve, the potential defendant may exercise his expertise or creativity to benefit society in a way that the plaintiff would not. Thus, the requirement of actual or expected competition likely will funnel the courts' energies into situations where incentives would be threatened most.

The competition requirement might seem to make the restitutionary right equivalent to a right against harm. That is not so: A right against harm would penalize any competitive act that took customers away from a preexisting producer; the restitutionary cause of action gives a producer rights only when she has produced a beneficial intangible and the other party competes with her by selling her intangible. Ordinarily, competitive harm is privileged; here, the restitutionary principle makes the difference. *Y's* use of a beneficial intangible produced by *X's* labor *against X* gives *X* the conditional right against *Y*.

There the 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, the case with which we began, *International News Service v. Associated Press*,³⁵⁹ is a case of both unfair competition³⁶⁰ and unjust enrichment.³⁶¹

³⁵⁸ Also, the prospect of such parasitism may discourage creativity *ab ante*. See Gordon, Prisoner's Dilemma, *supra* note 251 (discussing competition in the context of the prisoner's dilemma model).

³⁵⁹ 248 U.S. 215 (1918).

³⁶⁰ Samuelson, *supra* note 20, at 367-68.

³⁶¹ Dawson, *supra* note 13, at 1415-17.

Before leaving the topic of competition, the requirement in restitution doctrine that relief be granted only when an unjust gain is at the expense of the plaintiff has some relevant ambiguities that should be addressed. Courts sometimes will dispense with this expense requirement when an established right has been violated³⁶² or when the defendant's action is sufficiently egregious.³⁶³ Why then does the set of constraints insist on competition as a prerequisite for suit?

In those cases in which expense is premised on violation of an established right, restitution functions as a remedy, not as the substantive basis of the relief granted. Such cases often rest on analytic foundations different than those on which the cases based solely on restitution rest. For example, cases of trespass³⁶⁴ and trustee misuse of funds³⁶⁵ involve established rights, and such preexisting rights have their *own* internal logic. When a fiduciary betrays his trust, disgorgement punishes and deters acts the legal system has already determined are wrongful.³⁶⁶ There, the restitutionary award focuses on the defendant and on future persons who similarly might be tempted to betray their fiduciary obligations, *not* on remedying harm to the plaintiff. Proof of harm is therefore dispensable in such cases. The payment to the unharmed trust beneficiary may be largely a matter of convenience.³⁶⁷

A similar logic applies in the trespass case. In classifying land as "property" and giving the owner a right to exclude even harmless trespassers, the legal system has made certain *decisions*, such as that the owner can best make efficient choices about use of the resource. It commonly is argued that the owner can do this wisely only with inter-

³⁶² See *supra* notes 181 & 200-21 and accompanying text.

³⁶³ Thus, in *Harper v. Adametz*, 113 A.2d 136 (Conn. 1955), a purchaser was awarded a constructive trust against a broker who managed to take a secret profit in the form of land, even though under established law the defendant apparently owed a legal duty only to the seller, not to the plaintiff. See *Dobbs*, *supra* note 158, 686-87, 688 n.13; see also *id.* at 466 (viewing *Harper* through the lens of "almost fiduciary standards").

³⁶⁴ See 1 *Palmer*, *supra* note 153, § 2.5.

³⁶⁵ *Id.* § 12.11.

³⁶⁶ See *id.* § 2.11. "The duties of a fiduciary are among the most important known to the law, [therefore,] it is indispensable that there be some sanction for their breach, and often the only effective sanction is restitution in favor of the principal of gains realized by the fiduciary." *Id.* at 141.

³⁶⁷ Compare Coleman's position on corrective justice for comparison. See Coleman, *supra* note 54, at 12-14.

nalization of both costs *and* benefits.³⁶⁸ This economic view of property's functions would explain the landowner's ability to collect a significant monetary judgment when a defendant makes or saves money from a nonharmful trespass, for if the owner has such a right she will be better able to fulfill her function as a Smithian steward serving society's economic interests.³⁶⁹

An alternative explanation of the trespass rule views the owner as a "sovereign" with a personal interest in maintaining uninterrupted dominion. From this perspective, because even a nonharmful intrusion constitutes an interference with the owner's dominion, nonharmful intrusions must be punished or deterred. On either view of property, it is the applicable property model, rather than the restitutionary claim, that explains the landowner's ability to collect from a defendant the profits made from a harmless intrusion.

Where the legal system has *not* made such prior decisions about applicable duties and rights, the appropriative principle does not justify restitution where the defendant's act, however profitable to him, has caused the plaintiff no relevant loss. There is no established and preexisting exclusive right in the benefits that flow from labor. There is only a liberty to withhold one's labor, supplemented by rights against forms of coercion not implicated here.

Still, one could ask whether such an exclusive right should be created. If one granted the creator an entitlement to exclusive control over all the benefits her labor generates, then as a definitional matter the defendant's failure to pay could constitute an expense to her regardless of competition between the parties. If nothing else, the violation of such exclusivity could impair something the plaintiff values and could qualify as a wrong that should be deterred or punished.³⁷⁰

³⁶⁸ See Calabresi & Melamed, *supra* note 297; Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev. Papers & Proc.* 347, 349-56 (1967).

³⁶⁹ Adam Smith's "invisible hand" operates accurately only in an absence of externalities. See, e.g., Demsetz, *supra* note 368, at 347-49.

³⁷⁰ Cf. *Strand Elec. & Engr. Co. v. Brisford Entertainments, Ltd.*, 2 Q.B. 246, 254 (1952) (opinion of Denning, L.J.) (defendants liable for full market fee for equipment not returned because "[i]f a wrongdoer has made use of [another's] goods for his own purposes, then he must pay a reasonable hire for them, even though their owner has suffered no loss The wrongdoer . . . cannot be better off by doing wrong than he would be by doing right"). Note that the other judges treated the claim as one in detinue whereas Judge Denning viewed it as resembling "an action for restitution rather than an action of tort." *Id.* at 255. See generally Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* 609-13 (3d ed. 1986) (surveying English and American law).

These results—that any free riding on labor would be wrongful—demonstrate why exclusivity would be inappropriate for the benefits labor generates. The very interdependence of our society, with which this Article began,³⁷¹ should serve as a reminder of that.

One can see why *bodies* should have rights to exclude; the intangibles those bodies *produce* are a different matter. Labor's products come in too many forms to apply any such general rule. Even if there were consensus on the applicable norms, this variation in fact pattern would render a grant of exclusivity impossible to justify for benefits as such. Even if one limited one's inquiry to economics as the relevant criterion, the value of some intangibles might be maximized by a legally imposed centralization of management,³⁷² whereas for others such legal exclusivity may be unnecessary,³⁷³ and for still others central control would unduly inhibit creative adaptations. Similarly, if personality protection were adopted as the relevant criterion for granting property status, some intellectual products might be so connected to the author as to require her exclusive use,³⁷⁴ whereas for others the author's ties to the work might require only that copiers cite their sources accurately,³⁷⁵ and for yet other products, there might be virtually no "personality" component worth protecting at all.³⁷⁶

For some works, it is conceivable that these and other policies beyond reap/sow may require giving a creator exclusivity and a *prima facie* right over all derivative works, regardless of competition. The

³⁷¹ See *supra* notes 65-71 and accompanying text.

³⁷² Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 *J.L. & Econ.* 265 (1977). A similar set of variations would obtain if one looked at economics as providing incentives toward initial creation of an intangible. Different intangibles in different contexts require different incentives. See Breyer, *supra* note 131, at 344-45. (drawing a distinction between books, for which some types of copyright may be appropriate in his view, and computer programs, for which he thinks copyright more suspect).

³⁷³ See Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 *J. Legal Stud.* 683, 711-15 (1980) (suggesting that information is difficult to appropriate even independent of legal controls).

³⁷⁴ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L.J.* 287, 330-50 (1988).

³⁷⁵ Cf. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 *Duke L.J.* 1532, 1581 (suggesting that academic authors have other motives, such as the desire to augment their own prestige, that might lead them to desire maximum circulation).

³⁷⁶ See Margaret J. Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982) (arguing that some kinds of property are more "personal" than others and, therefore, should receive different types of legal protection).

legislature indeed has created such exclusive rights in particular areas,³⁷⁷ but nothing justifies courts' creating such exclusivity simply because a benefit has been created by someone's labor. Thus, the expense requirement should not be obviated by granting the plaintiff an exclusive right.

Similarly, the requirement should not be satisfied by considering copying per se some kind of moral wrong. Copying is essential to life, and the privilege of reaping without sowing in some contexts must be incorporated into any legal system if it is to be just.³⁷⁸ Therefore, the requirement that an actionable enrichment must be at plaintiff's expense has no easy substitutes, and it supports the cause of action's loss requirement, here interpreted as competition.³⁷⁹

³⁷⁷ See, e.g., 17 U.S.C. § 106 (1988) (providing exclusive rights in copyright); see also Gordon, *Inquiry Into the Merits*, supra note 37, at 1384-86 (explaining why a copyright owner might be entitled to revenues from markets it could not serve, at least so long as mechanisms exist for collecting the revenue and licensing the work).

³⁷⁸ See supra notes 65-71 and accompanying text.

³⁷⁹ Two sets of hypotheticals should be noted before leaving the competition requirement. First, consider cases where one might be sympathetic to a creator's desire to control a noncompeting use. Assume a poet loves only classical music or an engineer opposes hunting; each objects to a noncompetitive use of her work, for example, a rap group whose musical style offends the poet wants to use her poetry, or a weapons producer wants to use the engineer's invention. Second, consider less attractive claims: assume a public figure wishes to censor a hostile (noncompeting) biography by forbidding the author to quote her, or a misanthropic scientist has discovered a cure for AIDS that she prefers not to disseminate. The competition requirement would deny relief in *both* types of situations.

Some of these results may appear counterintuitive. But the realm of intellectual products embraces information and words and cultural symbols. It is highly important not to chill the use of such "products." See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). When balancing this need against the weak nature of a claim to reward for labor invested, it is best to begin with denying relief in situations where the plaintiff will not serve the needs of the audience that the defendant is prepared to serve.

Should particular interests demand more control, they should be accommodated, but in narrowly drawn ways. Personality-based theories, for example, might give the poet or the engineer some control over how her work is used, or an inquiry into economics more refined than a court usually can undertake might justify such control. But torts based on reap/sow are weak and subordinate to other considerations of the public interest. See, e.g., *Restatement of Restitution*, supra note 152, § 62 (transference protected by public policy).

As Harvey Perlman observed in a related context, "the establishment of some limits is imperative." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 74 (1982). To begin with a presumption that the producers of intangibles should control the intangibles' uses beyond their own range of uses (rather than demanding from them specific and additional

5. *Explanation of the "Nonreciprocity" Requirement*

Many recent theories of property and tort rights have made varying uses of the basic insight that it may be fair to adopt a legal rule that disadvantages an individual at a particular moment if the rule, when generally applied over time, will work to the individual's advantage.³⁸⁰ This principle applies to insubstantial uses. Because a plaintiff loses little from a small use by a defendant (e.g., the copying of a few words) and probably will find it useful to be able to quote short segments from others' works, her own long-term self-interest suggests that the law should not restrict such uses. Thus, copying of a few words probably would be "reciprocal" and thus would *not* generate a right of action.

This fairness rationale also might excuse even some quantitatively significant uses. For example, one might argue that a cause of action should be enforceable for only a limited number of years after the initial distribution of the intangible. Because all intangible producers must copy from predecessors, they likely will find that a limited duration serves their self-interest.³⁸¹

From an economic perspective, the argument for requiring proof of nonreciprocity depends primarily on the fact that giving a cause of action usually involves greater transaction and enforcement costs than does denying a right of action. If granting a right of action accomplishes nothing but a short-term (and in the long run, reversible) wealth transfer, transaction costs often will weigh against giving the right.

justifications for control beyond their own range of uses) would be to start at the wrong end, at least where the producer's claim is based solely on labor.

One must admit that current copyright and patent may begin with the opposite presumption. In one of its most recent copyright cases, for example, the Supreme Court said in dicta that an author could "hoard[] all of his works." *Stewart v. Abend*, 110 S. Ct. 1750, 1764 (1990). In patent, nonuse of one's patent usually is permitted. See Gordon, *Inquiry into the Merits*, supra note 37, at 1376. But see *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 424-30 (1908) (holding patentee entitled to injunction despite its nonuse of the invention, but keeping open the possibility of exceptions based on the public interest).

³⁸⁰ See, e.g., Michelman, supra note 284, at 1218-26; cf. Landes & Posner, supra note 27, at 333 & n.13 (urging *ex ante* assessment of copyright holders' interests).

³⁸¹ Cf. Landes & Posner, supra note 27, at 361-63 (analyzing duration with a primary focus on tracing costs). Of course, once taken outside the statutory context, the problem of courts drawing arbitrary lines, such as "X number of years," arises.

But, as an empirical matter, the transaction-cost question can go either way.³⁸² In addition, awarding a right of action may have economically desirable allocative effects, even in situations of reciprocity. Though a tit-for-tat version of *fairness* may not require payment for reciprocal harms and benefits, a right of action sometimes will be necessary even in reciprocal situations to encourage productive behavior or to discourage destructive behavior.³⁸³ For example, in a tragic common or in a reiterated prisoner's dilemma setting, the parties left to their own devices may well impose equal harms on each other over time; an appropriately tailored legal rule, however, can encourage mutually beneficial cooperation.³⁸⁴ Hence, reciprocity alone does not guarantee desirable results.

My intuition is that denying a cause of action to persons who generate intangibles would not result in a lower level of value-creation in most reciprocal situations. To the contrary, freeing creators of the obligation to trace and to contract for the elements they want to use would encourage creative spontaneity.³⁸⁵ The transaction costs of paying for reciprocal benefits could slow or swamp even pedestrian, relatively noncreative investigations. Nevertheless, in contexts where the law's allowing unrestrained reciprocity would result in private parties' wasting significant resources in efforts to achieve a short-run benefit, or where it would yield undesirable allocative incentives, the nonreciprocity component of the hypothesized set of constraints could be abandoned. In addition, given the difficulty of gathering the data needed to resolve the reciprocity issue in many instances, argua-

³⁸² Litigation is usually more transactionally expensive than entering into a contract. But sometimes the availability of a right of action makes contracts possible and minimizes transaction costs. See e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485-91 (1974) (indicating that wasteful monitoring and secrecy-enforcing costs would be involved if trade secret law were abolished). Transaction costs will vary according to context.

³⁸³ I am indebted to Richard Epstein and David Friedman here.

³⁸⁴ See Davis, *supra* note 334, at 95-103, 128-31; Garrett Hardin, *The Tragedy of the Commons*, in *Economic Foundations of Property Law 2* (Bruce A. Ackerman ed., 1975). Thomas Schelling gives this example: all hockey players may want to wear hockey helmets, but without a rule requiring helmets to be worn, each may refuse the protective headgear lest he appear to the fans less courageous than the other players. The players may prefer a regime where all (equally) wear helmets to a regime where all (equally) go bareheaded. Thomas C. Schelling, *Micromotives and Macrobehavior* 213 (1978); see Gordon, *Prisoner's Dilemma*, *supra* note 251.

³⁸⁵ See Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 12 (arguing that most art requires conscious and unconscious use of predecessors' work).

bly constraint (d) should be reformulated as an affirmative defense, so that it would bar suit only upon a defendant's showing that reciprocity exists.

6. *Explanation of the Requirement of Deliberate Production "in Excess of Legal Duty"*

Restitution is not available for one whose benefits fulfill a preexisting duty owed to the recipient.³⁸⁶ Many philosophers have argued more broadly that fulfilling one's moral duty deserves no special reward.³⁸⁷ A defendant might argue that it would be unfair to require him to pay the plaintiff for a byproduct of plaintiff's performance of a duty owed to anyone.

Whatever its roots in moral theory, an excess-of-legal-duty requirement also has an economic explanation. A producer who is under a legal duty to produce something, as a telephone company may have a statutory obligation to produce a phone book, already has incentives to produce. Giving such producers a right of action will yield no additional output but simply will impose deadweight losses and potentially inhibit valuable second uses. Thus, the excess-of-legal-duty requirement makes economic sense.

The legal duty element of the hypothesized tort refers to duties imposed by the law without regard to the parties' consent; it does not refer to duties owed to third parties by contract.³⁸⁸ The presence of a contract price should not be treated as the equivalent of a finding that the plaintiff had all the incentive she needed. For example, a think tank may produce a particular report because it has contracted with the federal government to do so,³⁸⁹ and a publisher of case reports may produce a compilation of opinions because it has contracted with a state government to do so, but the terms of these contracts may vary

³⁸⁶ Restatement of Restitution, *supra* note 152, § 60; see also *id.* at § 61 (moral duty).

³⁸⁷ See, e.g., Becker, *supra* note 76, at 41-42, 53-54 (1977).

³⁸⁸ I do not address here the borderline cases between tort and contract.

³⁸⁹ Though works prepared by government officers and employees are placed in the public domain, 17 U.S.C. § 105 (1988), Congress declined to "mak[e] any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58-60 (1976).

Works by governmental employees indeed should be in the public domain, but, in my view, for reasons of democracy that are more important than incentive concerns. Under the malcompetitive-copying tort, this issue should be treated by element (g), general suitability for property treatment. See *infra* notes 405-11 and accompanying text.

depending on whether legal protection vis-à-vis third-party copying is available to the contractors: If the think tank and the publisher have rights against third parties, they may have an additional potential source of compensation that might make them willing to produce the desired item at a lower cost to the immediate customer. The prospect of obtaining no protection might merely increase the contract price or, more seriously, might create so much externalization of benefit that an otherwise desirable contract might not be entered.³⁹⁰ For these reasons, judicial protection should not be denied simply because the plaintiff has a contractual obligation to produce.³⁹¹

In addition to excess of legal duty, the plaintiff must show an expectation of sale or control. This part of element (e) reflects the idea that there should be a nexus between that which the plaintiff sought to create and the benefits over which she now seeks a right of action.³⁹² This requirement ensures that the plaintiff will have something at stake that will be affected if the defendant is allowed the free use of the plaintiff's production. The requirement also helps to direct enforcement toward cases in which it will aid incentives.³⁹³

³⁹⁰ Also note another difficulty: An author or inventor under contract to an employer admittedly has an incentive to produce the product for which she is being paid, and that incentive may not depend on the number of copies sold or on a legal right to be paid for copies made. The employer's willingness, however, to hire the author or inventor may depend on the availability of legal relief against third parties who copy. To allow the existence of a contractual incentive to act as a bar would cause problems in those cases where the plaintiff was such an author. (Admittedly, such cases would be rare. The right to control probably would be held by the employer because, though the malcompetitive-copying tort has no rules on "work made for hire," such control likely would be assigned by contract to the employer. The employer himself is under no duty, contractual or otherwise, to produce the work.)

³⁹¹ I am indebted to Adam Pritchard here.

³⁹² This also is true of the requirement that the plaintiff intend to sell or to distribute the product in the market at issue (recall requirement (c), competition between the parties). I include the overlap in the set of constraints because I think the competition requirement likely to prove controversial, and the element of plaintiff's "stake" is too important to risk losing it in a debate over the competition requirement.

³⁹³ The economic argument is straightforward. Some expectation of reward or control likely gives the plaintiff an economic as well as a psychic stake in what happens to the work. The presence of such an expectation suggests that the plaintiff might respond to positive incentives such as the availability of the proposed right of action against free riders. Note that the requirement that plaintiff show *some* expectation of sale or control is much easier to meet than would be a requirement that the plaintiff show an expectation of sale or control of a *particular* market. Cf. *supra* note 346 (discussing the requirements of element (c)). Thus, the requirement is less likely to introduce a stutter into the incentive message.

Absent some intent to control or to sell the work, a plaintiff would be largely indifferent to the incentives provided by a right to sue. Further, in such cases a plaintiff has little ground to complain on the basis of autonomy if denied a right of action. For example, if the creator made the item with the intention of giving it away, she arguably would have a relatively weak autonomy claim if she later tried to restrain the recipients' use or to force them to pay.³⁹⁴ Without a stake of some kind, some kind of a vested interest on the plaintiff's part—and I am flexible on how this might be defined—the plaintiff's claim would seem flimsy and would be outweighed easily by the typical defendant's interests.

An additional factor included in requirement (e) is deliberateness. Anthony Kronman has suggested that the law tends to treat deliberately acquired information differently than that which is acquired casually.³⁹⁵ Greater legal protection for the former makes economic sense.³⁹⁶ For instance, although random creativity exists, it is

³⁹⁴ In this vein, see *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970). On a technical level, this case addresses the law of copyright notice back in the days when lack of a notice on a "published" copy invalidated the copyright and put the work in the public domain. But the case also is about the effect of donative intent on the definition of property rights.

Picasso had given a maquette and the right to reproduce it to the Art Institute of Chicago and to the Public Building Commission of Chicago, respectively, "desiring that these gifts shall, through them, belong to the people of Chicago." *Id.* at 1306. Without a copyright notice, the city displayed the maquette and encouraged photographs of it. The city later tried to defend its copyright. *Id.* at 1307. Although precedent suggested that the court might have ruled that there was only a "limited publication" for which no notice would have been required, see, e.g., *King v. Mister Maestro*, 224 F. Supp. 101, 106 (S.D.N.Y. 1963), the court instead ruled that a divestitive publication without notice had occurred. *Letter Edged in Black Press*, 320 F. Supp. at 1313.

In my view, the absence of copyright notice here accurately reflected the city's attitude. At least at first, the city had no intent to restrict replication. In addition, as the court noted, Picasso's ambiguous deed of gift had "dedicated [the sculpture] to the public," possibly making it "thus incapable of being copyrighted." *Id.* at 1309 n.*. Given this lack of stake in the copyright, it is not surprising that the court held the maquette and the sculpture to be in the public domain.

³⁹⁵ See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1, 13-18 (1978) (arguing that forced disclosure of deliberately acquired information may destroy incentives to produce socially valuable information but that casually acquired information need not be protected from forced disclosure because its production needs no special incentives). But see Kim L. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* 124-26, 162-78 (1988) (criticizing Kronman).

³⁹⁶ Kronman, *supra* note 395, at 13-18. Note, however, that centralization of the management of particular intangible resources in one "owner" can be economically desirable.

unlikely to be induced by legal incentives. As for fairness, deliberateness increases the nature of the plaintiff's stake, which is relevant to the autonomy concern.

Roughly speaking, deliberateness includes even accidental byproducts if they issue from a project that is undertaken with something close to such products in mind. A serendipitous element would not disqualify an otherwise eligible intangible. Inventing a telegraph when one was trying to invent a telephone would yield an intangible that could be protected. By contrast, if one happened to overhear valuable information, that would not be deliberate acquisition. For much creative activity, virtually any production will be deliberate.³⁹⁷ For other activities, the distinction between deliberate and casual production may make a difference.³⁹⁸

Including the deliberateness requirement gives the courts a supplementary tool with which to assess that part of the autonomy issue that I have called the magnitude of the plaintiff's stake and the economic issue of how far it is desirable to maximize a plaintiff's ability to control the rewards generated by the intangible in question.³⁹⁹ The deliberateness requirement also might assist a court in assessing the prospect that a potential user would be *surprised* by the plaintiff's claim of exclusivity, which relates to the issue of the defendant's autonomy.⁴⁰⁰ The rationale for the requirement therefore can be

See Kitch, *supra* note 372, at 285-86 (discussing patents). This rationale for property rights can exist regardless of whether the intangible was acquired deliberately or casually.

³⁹⁷ For example, it is hard to imagine how one could nondeliberately paint in oils. I am indebted to Gary Francione here.

³⁹⁸ See Kronman, *supra* note 395, at 13-18. The fact that there can be a *skill* in identifying the value even in serendipitously encountered information, just as there is a skill in identifying which of several drafts or even slips of the hand are worth adopting and presenting to the public, raises a lingering doubt. Also, scholars have questioned Kronman's thesis that deliberateness is a prerequisite to legal protection. See, e.g., Scheppele, *supra* note 395, at 124-26, 162-74.

³⁹⁹ This is not a matter only of providing incentives for initial production. The work of Ed Kitch and Mark Grady suggests that an additional and important economic criterion for protection might be the extent to which the plaintiff is the person best situated to organize the exploitation of the work or to investigate new applications of it. See Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 Va. L. Rev. 305 (1992); Kitch, *supra* note 372. Deliberateness may provide an avenue into, or a not-inadequate proxy for, this functional inquiry. Only persons with knowledge of a field are likely to be in good positions to exploit a discovery in it, and such persons likely will meet the deliberateness test.

⁴⁰⁰ A plaintiff's conduct of its business may indicate the area it means to control, and demand for payment that seems outside that range may be unexpected.

stated as follows: the more deliberately produced is the particular aspect of plaintiff's production, the greater is likely to be the plaintiff's autonomy stake in the outcome of the lawsuit, the plaintiff's responsiveness to incentives, and the plaintiff's expertise regarding the contested use of the intangible. Further, depending on context, the greater the plaintiff's deliberateness, the greater will be the likelihood that a potential user will realize he probably will be working another's staked-out field.⁴⁰¹

Because the deliberateness requirement does not rule out judicial protection for those accidental byproducts that fall close to the plaintiff's initial goal, it does not work as an absolute bar to protection of serendipitous discoveries. Rather, it hopefully will prompt the courts to determine, case by case, the proper level of generality at which to

⁴⁰¹ Current statutory law requires that patentees publicly record that which they are claiming; this not only makes clear the plaintiff's stake but also warns potential defendants. See 35 U.S.C. § 112 (1988) ("The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."). Once the claim is on record, however, even independent inventors who have no actual notice of it can be liable for infringement. Nevertheless, in the ordinary case, the scope of the patent claim will work both to make clear the plaintiff's stake and to limit the likelihood of defendants' being taken unawares. See, e.g., *Permutit Co. v. Graver Corp.*, 284 U.S. 52, 60 (1931) (statute "requires the patentee . . . to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which not"); *Evans v. Eaton*, 20 U.S. 356, 434 (1822) (one object of claimant's specification is to "guard against prejudice or injury from the use of an invention which the party may otherwise innocently suppose not to be patented").

In copyright, the lack of teeth in the registration and new notice requirements, and the occasional vagueness with which infringement standards are applied, create two dangers: lack of warning to copyists, and a sometimes unwarrantedly large scope for a plaintiff's copyright. Occasional overbroad applications of the plaintiff's right to control derivative works also pose the latter danger. 17 U.S.C. § 106(2) (1988). As an example of this danger, consider *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (affirming summary judgment against defendant who purchased books and cut from them pictures that he then pasted on tiles). A deliberateness requirement is not meant to rule out all rights to sue for unauthorized derivative works but is meant to give courts a handle on conducting a sensible exploration into the breadth of such a right.

If this all seems an imprecise and difficult set of inquiries, it is: the subject matter compels it. The proper response to the difficulty is not to oversimplify the tort of malcompetitive copying. That is the current trend, and as a result of simplification, misappropriation has become a vague threat that chills potentially creative or otherwise useful applications of intangibles. See *supra* text accompanying notes 26-53. Should the institutional difficulties for a court appear overwhelming, the best response would be to forgo judicial action in favor of legislative action.

identify the plaintiff's goal.⁴⁰² The plaintiff's stake and fairness to the defendant should be the primary criteria for choosing the level of generality, to be supplemented, when the data are available, by an economic inquiry into the plaintiff's incentives and into her expertise in modes of developing (exploiting) the intangible.

One final note: Requirement (e) refers to the conditions under which the *plaintiff* created the work. It does not specify how the courts should treat claims by the plaintiff's successors in interest, whether corporate or personal. Further, with time the corrective justice claim of a creator will become attenuated, as will the incentive effects of any long-in-the-future award. Though specifying a cut-off point for protection is difficult, some specification should be incorporated into the tort, either separately or through this element.⁴⁰³

7. *Explanation of the "Demarcation" Requirement*

Unless the item is marked clearly in terms of its boundaries and ownership and provides some means by which the owner can be located, the user often will be unable to proceed through the market. Any successful lawsuit for payment necessarily involves compulsion. This compulsion might have been unnecessary had the creator provided demarcation. Encouraging the creator to mark the product is a

⁴⁰² For example, to identify Alexander Graham Bell's goal as "exploring ways to use mechanical and electrical devices for the reproduction and transmission of sound" is a more general statement of his goal—and a more appropriate one—than would be "exploring whether chemical solution *X* assists in producing the transmission of sound." To identify a publisher of case reports as having the goal of "producing usable compilations of legal opinions" is narrower—and more appropriate—than attributing to that entity the goal of "reaping as much money as possible from any conceivable use that might be made of its compilations." And, just as I would argue against the latter as too general, I would consider too narrow other descriptions of the publisher's goal: for example, if the goal were stated as "producing this particular complete sequence of opinions," that statement conceivably could prevent the publisher from complaining about anything short of a verbatim reproduction of the exact order of an entire set of case reporter volumes. A set of normative and empirical judgments, with which one certainly could quarrel, underlies this choice of generality level. For example, is it correct that the very narrow reading would undervalue plaintiff's apparent stake? Is it correct that the very broad reading would overvalue plaintiff's stake and impose surprise on some persons who reasonably would have imagined that their uses were permitted? One would hope there would be agreement on the choice of criteria to be considered.

⁴⁰³ See *supra* note 381 (suggesting that the need for durational limits may favor the judiciary's ceding power in the area to the legislature).

fair and cost-effective method of encouraging markets.⁴⁰⁴ Demarcation would not be necessary under element (f) if the defendant had available by other means the knowledge provided by such marking.

8. *Explanation of the "Other Suitability" Requirement*

Requirement (g) refers to the possibility that certain intangibles might be unsuitable objects for private claims.⁴⁰⁵ A growing literature addresses resources that are unsuitable for market trading because they should be treated either as incapable of sale (e.g., the law⁴⁰⁶ and some forms of bodily integrity⁴⁰⁷) or as inherently public (e.g., law and ideas⁴⁰⁸). This literature could provide useful starting points for the inquiry into ineligibility.

Clearly, preservation of some arenas from commercialization has value.⁴⁰⁹ In restitution cases, for example, nonprofessionals usually are not entitled to restitution for their efforts to rescue persons in peril.⁴¹⁰ This pattern may reflect a belief that motives of heroism provide more reliable inducements to rescue than do monetary incentives and that providing monetary incentives would decrease the likelihood of heroism.⁴¹¹ Similarly, many scholars and artists are drawn to their work by its noncommercial aspects. Too large a right (and obliga-

⁴⁰⁴ Further, fairness and the societal arguments for demarcation parallel the arguments regarding knowing use (in requirement (a)) and defendant's ability to proceed through the market (in requirement (b)). Nevertheless, American copyright law no longer mandates notice. See Leaffer, *supra* note 25, at 110.

⁴⁰⁵ General ideas, such as the use of perspective in art or the theory of relativity, may constitute one such class of ineligible intangibles, as might standards (e.g., the Celsius or Fahrenheit temperature scales). See Gordon, *Equality*, *supra* note 64, at 63-75.

⁴⁰⁶ See, e.g., 17 U.S.C. § 105 (1988) (works of United States government officials not copyrightable); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 *UCLA L. Rev.* 719 (1989); see also *supra* note 389 and accompanying text (discussing relation of this consideration to the legal duty requirement).

⁴⁰⁷ See, e.g., Calabresi & Melamed, *supra* note 297, at 1090-93; Margaret J. Radin, *Market Inalienability*, 100 *Harv. L. Rev.* 1849 (1987); Susan Rose-Ackerman, *Symposium on Law and Economics: Inalienability and the Theory of Property Rights*, 85 *Colum. L. Rev.* 931, 932, 948-49 (1985); see also *In the Matter of Baby M*, 109 *N.J.* 396 (1988) (holding reproductive service not subject to valid contracts).

⁴⁰⁸ See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. Chi. L. Rev.* 711, 776-81 (1986).

⁴⁰⁹ See, e.g., Richard M. Titmuss, *The Gift Relationship* (1971).

⁴¹⁰ See Hope, *supra* note 174, at 35-36.

⁴¹¹ See William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. Legal Stud.* 83, 93-100 (1978).

tion) of payment could erode these motivations (an economic argument) and could eliminate the very characteristics that make attractive the arena in which they use their skills (a harm argument).

The nature of the suitability inquiry can be only intimated here. The inquiry is deliberately open-ended to embrace the normative issues implicated by each particular intangible. The prior elements in the list of minimum constraints accommodate only policies implicated by benefits *in general*; specific uses will require additional inquiry.

C. Remedy

Some necessarily tentative suggestions must be made regarding the remedy that would accompany the proposed tort. The first question is whether injunctive relief should be available.

A strong argument commonly made in favor of injunctions in the intellectual products area includes the difficulty of pricing intangible goods⁴¹² and a reluctance to place such an inherently imprecise and potentially costly task on the judiciary. This argument strengthens the more generally applicable arguments in favor of injunctions, such as the likelihood that monetary measures will undercompensate plaintiffs⁴¹³ or the desirability of encouraging use of the market by threat of injunctive “kickers” because of the market’s superiority over courts as a price-setting institution.⁴¹⁴ On one level, injunctions might even seem particularly well-tailored for use with my hypothesized tort: because the instant right of action is available only to plaintiffs who are willing to serve the defendant’s target market,⁴¹⁵ giving such a plaintiff the power to enjoin a defendant’s activity will not deprive the consuming public of a source for the contested good. Further, the

⁴¹² See, e.g., Douglas Laycock, *The Death of the Irreparable Injury Rule* 47 (1991).

This section was circulated separately. I am indebted to Doug Baird, Richard Epstein, David Friedman, Brian Kahin, Bill Landes, and Doug Laycock for comments on this section; Andrew Coleman’s analysis of several recent copyright cases also was helpful.

⁴¹³ See Laycock, *supra* note 53, at 690 n.7.

⁴¹⁴ Cf. Calabresi & Melamed, *supra* note 297, at 1126 (market-preserving “kickers” as an explanation for criminal penalties). Calabresi and Melamed’s argument on injunctions is actually far from clear. Though they do a good job of explaining why a right to exclude may be invaluable in setting up consensual markets, they sometimes seem to imply that giving an injunction after a breach of such a right is equivalent to having prevented the breach in the first instance.

⁴¹⁵ See *supra* text accompanying notes 336-79 (suggesting that, to bring suit, plaintiff must show actual or imminent competition between herself and defendant in the contested market).

threat of injunctions encourages use of the market, and one of the preconditions of this tort (asymmetrical market failure⁴¹⁶) ensures that the tort can be invoked only when defendants have a market to which they can resort.

On the other hand, injunctions bring with them the threat of overdeterrence because a defendant's product may mix inextricably the defendant's own resources with those of the plaintiff.⁴¹⁷ Enjoining a defendant from using this mixed product effectively destroys the resources he has invested in it,⁴¹⁸ the prospect of which may chill the production of desirable adaptations of plaintiff's work.⁴¹⁹ An injunction's potential for affirmatively harming the defendant—taking more from him than he took from the plaintiff—also poses fairness problems that are particularly important given the corrective justice foundations of the tort.⁴²⁰ Moreover, many intangibles involve works of expression, and it has long been a valued tenet of First Amendment law that prior restraints of speech should be avoided.⁴²¹

⁴¹⁶ See *supra* text accompanying note 311 (suggesting that, to bring suit, plaintiff must show asymmetrical market failure and that showing that the defendant could have proceeded through the market is part of this requirement).

⁴¹⁷ Consider, for example, a movie that uses a novel's plot as the basis of its screenplay.

⁴¹⁸ One might argue, however, that the threat of injunction merely would lead to bargaining and that, as a price for not enforcing its injunction, the plaintiff likely will demand less than all of the defendant's profits.

⁴¹⁹ The extent of the chilling effect depends, *inter alia*, on the uncertainty of outcome virtually inevitable in any lawsuit; the less sure potential users are of what constitutes actionable behavior under the tort, the more otherwise desirable behavior is chilled. The complexity of the inquiry under my hypothesized tort (like the vagueness of the current misappropriation tort) makes the uncertainty problem substantial. See *infra* text preceding note 469 (the potential superiority of legislative boundary-setting over judicial boundary-setting).

⁴²⁰ See *supra* Parts I.B. & I.D.

⁴²¹ Historically this has been a tenet well-respected in all areas *except* intellectual property, an exception no court yet has explained adequately. The most likely reason why "prior restraint" language has not appeared in intellectual property cases is the doctrinal truism that "ideas" are not subject to propertization under the applicable federal statutes—primarily copyright and patent. It is assumed too easily, however, that because the doctrines say that only the particular *expression* of ideas can be restrained, no First Amendment problem arises. Numerous cases make clear that restraints on expression also can restrain the dissemination and evaluation of ideas and facts. For instance, the licensee of the Church of Scientology has attempted to use copyright law to enjoin a biography critical of L. Ron Hubbard. See, e.g., *New Era Publications, Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir.) (holding the biography an infringement, but declining to enjoin publication of the particular book because of laches), petition for reh'g denied, 884 F.2d 659 (2d Cir. 1989), cert. denied, 110 S. Ct. 1168 (1990).

Most of the arguments in favor of injunctions lose their strength if the monetary remedy is strong enough to force potential defendants to use the market, thus substantially relieving the judiciary of the need to "make markets" or set prices. Yet most measures of monetary recovery either will be so strong as to duplicate many of the injunction's dangers (e.g., the prospect of being deprived of all one's profits may "chill" creative uses as much as the prospect of an injunction) or will be so weak as to offer insufficient encouragement for defendants to seek out market bargains (e.g., the prospect of being made to pay fair market value if sued successfully is unlikely to encourage users to pay that same price voluntarily).⁴²²

The tentative solution I proffer is to set plaintiff's recovery at the highest monetary amount that is a fair measure of what the defendant took.⁴²³ In many cases, this will be an amount equal to the highest price defendant would have paid had he gone through the market.

The value of what the defendant copied can be conceptualized in three ways:⁴²⁴ the damage the defendant's use caused to the plaintiff

⁴²² See *Iowa State Univ. Res. Found. v. American Broadcasting Co.*, 475 F. Supp. 78, 83 (S.D.N.Y. 1979) (arguing that to limit defendant's liability to the same price it might have paid after consensual negotiation would remove motivation to obey the copyright law).

⁴²³ It is important to recall that this "highest value" approach applies only to defendants who could have gone through the market. For those defendants who face market failure, this tort opts to impose no liability at all. See *supra* text accompanying notes 311-35 (discussion of reasons for the requirement of asymmetrical market failure). Were the misappropriation tort reformulated to impose liability on persons who *did* face market failure, however, the appropriate measure of monetary recovery then would have to be tailored accordingly. Where imposing a "kicker" would not encourage use of markets, an award of reasonable royalty set at the *ab ante* fair market value likely would provide a better measure of relief than would the "highest value" approach. See *supra* note 318.

The nature of the choice between the two options of giving free use to defendants facing market failure, or of imposing on them a reasonable royalty, is more complex than the discussion here. For an introduction to this question, see Gordon, *Fair Use*, *supra* note 28, at 1618-24 (discussing intermediate cases of market failure and alternatives to the grant of free use).

⁴²⁴ In a given case, the most realistic high price would have included both reimbursement for expected loss and some share of the defendant's profits. So long as double-counting is avoided, the suggested remedy does not bar collecting under more than one heading.

in terms of lost profits in her current and anticipated⁴²⁵ markets;⁴²⁶ the amount of money the defendant saved by using the plaintiff's work;⁴²⁷ or the amount of the defendant's profit that is fairly allocable to the contribution made by the plaintiff's work.⁴²⁸ A successful plaintiff should be awarded whichever is the highest of the three.

⁴²⁵ Arguably, only damage to existing markets should be covered here, to avoid litigative speculation about the plaintiff's likely markets had the defendant not acted. In favor of such a position, it might be argued that even if the damage calculation omits future markets, those likely markets might not be ignored: they could be considered under a different heading. Because a defendant's profit in a new market is probably equivalent to what the plaintiff would have earned in the new market, the plaintiff's loss of such profit would be taken into account via the "allocable profit" measure.

There may be cases, however, where this is not the case—where, for example, a defendant effectively saturates a new market so that the plaintiff cannot sell the work there, but the defendant does this so badly as to have no profit. A measure of damage open to proof of loss in markets not yet entered therefore seems desirable, at least as a first approximation.

⁴²⁶ This amount presumably will be the lowest compensation that the plaintiff would have accepted (i.e., her reservation price).

I would exclude as irrelevant any damage resulting from causes other than substitution effects, for example, lost sales caused when a defendant's satiric use of a plaintiff's work changes the public's attitude toward the work. For my reasons for excluding such damage, see Gordon, *Fair Use*, supra note 28, at 1633-34 & n.183; for a contrary position, see Fisher, supra note 29. I also would exclude from consideration damage to a plaintiff's noncommercial interests; should the defendant defame her or invade her property, such behavior should be actionable, if at all, under doctrines tailored to those interests.

⁴²⁷ If the defendant could have used an alternative product, the price of that alternative would be one plausible measure of the money saved and thus of the benefit the defendant reaped. If the price of the alternative good is higher than the price the plaintiff would have demanded, then the price of the alternative good nevertheless should be the relevant measure of "costs saved." (I recommend this approach in order to retain an incentive to prod defendants to ask permission for what they use.)

The price of alternative goods will be roughly equal to the fair market value of the plaintiff's good only where fungible alternatives to the plaintiff's good are available for license. The cases often ignore the lack of fungible alternatives. For example, in *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946), the plaintiff already had a tramway running across its land. When the coal company exceeded its easement by transporting more coal than the easement permitted, the (very expensive) alternative to using the plaintiff's land was running *another* tramway through someone else's land. The court, unfortunately, merely awarded the plaintiff an award equal to the fair market value of an expanded easement on land already having a tramway on it. *Id.* at 239. At least this was better than prior precedent, which refused any substantial recovery for nonharmful trespasses. *Phillips v. Homfray*, 24 Ch. D. 439 (1883).

⁴²⁸ Though there is much uncertainty in estimating allocable profits, the Supreme Court has suggested in a related context that it nevertheless may be workable. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399-402 (1940).

This overall approach—of pegging monetary recovery to the highest measure of what the defendant would have paid—is roughly consistent with what one finds today in the copyright and trademark statutes. In both copyright law, see 17 U.S.C. § 504 (1988), and federal trademark law, see § 35 of the Lanham Act, a plaintiff is entitled to recover both her damages

A monetary recovery equal to the highest value that can be placed on what the defendant took satisfies all the goals set forth above.⁴²⁹

and a share of the defendant's profit. In copyright there is, unfortunately, no clear entitlement to recover what the defendant *saved* by not paying for the plaintiff's work; this could lead to the anomalous result of freeing a copyright infringer of any obligation to pay. Such a result may both undercompensate the plaintiff from the point of view of giving the plaintiff desirable positive incentives and give a defendant a free ride not justified by the considerations surveyed elsewhere in this Article.

Thus, the courts sometimes have been less than adept in implementing the statutory measures, and Congress has been less than adept in explaining their underlying theories. For example, compare *Deltak, Inc. v. Advanced Systems*, 767 F.2d 357 (7th Cir. 1985) (holding that costs saved by defendant should be taken into account in computing the damage award; court explicitly concerned with estimating the price defendant would have paid had he sought permission prior to copying) with *Business Trends Analysts v. Freedomia Group*, 887 F.2d 399, 406 (2d Cir. 1989) (rejecting the relevance of costs saved by the copying on the ground that, at least given the availability of statutory damages for registered works, Congress was unconcerned with "the fictive purchase price that [defendant] hypothetically chose not to pay [plaintiff]" for use of an unregistered work). But cf. *Sunset Lamp Corp. v. Alsy Corp.*, 749 F. Supp. 520, 524 (S.D.N.Y. 1990) (criticizing the *Deltak* approach). (I am indebted to Andrew Coleman for bringing these and related cases to my attention.)

The *Business Trends* approach somewhat resembles the stance taken toward harmless but benefit-yielding trespasses in *Phillips*, a now largely disfavored remedies case that refused to award the plaintiff a significant monetary award despite any monetary benefit the defendant may have reaped by the trespass. *Business Trends*, like *Phillips*, may result in users paying nothing, despite cost savings. Even in *Deltak*, where the court is aware of the need to encourage compliance with the copyright law, see *Deltak*, 767 F.2d at 363 & n.3, the court does not require the defendant to pay the *highest* price he might have paid ab ante. A more explicit focus on searching for the highest price that the defendant would have paid, and explicit inclusion of a "costs saved" criterion, would provide better internalization of benefits and would encourage ab ante negotiation in most cases where copying is harmless to the plaintiff but beneficial to the defendant.

Arguments from restitution should, however, be applied only cautiously to cases governed by statute. Plaintiff's failure to register the work with the Copyright Office may provide a justification for the *Business Trends* decision on its particular facts. The Copyright Act has a complex administrative and remedial structure (including, in some circumstances, the provision of statutory damages) that as a whole arguably serves the goals I have outlined, and the *Business Trends* decision might be defended as bolstering an important part of that structure, namely, registration. (In addition, of course, it commonly is argued that copyright is premised primarily on public benefit considerations rather than on creators' reap/sow claims, which may lead to further differences between copyright and the malcompetitive-copying tort.) Even in terms of my proposed tort, which is much simpler than any legislatively crafted scheme, the result in cases like *Business Trends* might be defended. A plaintiff's failure to register the work for copyright arguably might be equivalent to a finding (were this a case of malcompetitive copying) that the plaintiff had failed to demonstrate the deliberateness and high stake ordinarily evidenced by registration or had failed to give a defendant sufficient notice as to the scope of ownership claimed, and therefore had failed to satisfy the elements necessary to qualify the work for protection as an eligible intangible (see elements (e) and (f) of the proposed tort).

⁴²⁹ See supra note 295 for further discussion of the merits of such a measure.

Because the defendant would have paid substantially less than this amount had he initially approached the plaintiff to seek a license or assignment, similarly situated persons will avoid the court-imposed measure of payment and instead will utilize the market. Because the measure is set at an amount that can be conceptualized as equal to the benefit the defendant reaped⁴³⁰ and because the tort is structured to enable defendants to protect themselves from surprise impositions of liability, requiring the defendant to pay this amount to a plaintiff is fair. Further, in many cases it will not harm the defendant affirmatively. For that reason, chilling effect should be small.⁴³¹

The question of remedy is complex and needs more investigation than provided here.⁴³² For example, a full analysis should examine,

⁴³⁰ One goal of corrective justice arguably is to “undo” transactions in a way that leaves both parties no worse off than they were; at first blush, this may appear inconsistent with imposing a monetary award on those defendants whose profits are less than the costs (damages) they have imposed on the plaintiff. Even a damage remedy, however, can be conceptualized as a measure of what the defendant reaped, for damages measure the monetary value of the opportunities he usurped from the plaintiff.

It might be argued that the defendant at the moment of copying is taking a benefit (the opportunities otherwise open to the plaintiff) that the “damage” award simply forces him to disgorge. That this benefit turns out to be worth less to him than it would have been to the plaintiff is unfortunate, but arguably not relevant to the issue of where corrective justice lies. (The latter contention leads directly to the issue of when a benefit should be measured. Compare the issue of erasable enrichment within restitution law.)

⁴³¹ Note that the prospect of paying damages probably will discourage those users whose expected profit is less than the amount of damage their use will inflict. Such cases may occur often: a copyist frequently may be less skilled in packaging or presentation, or may have access to less efficient distribution routes, than will the original creator. Discouraging such undesirable uses is a *proper* result. “Chilling effect” refers to the prospect of discouraging *desirable* behavior.

The remedy suggested here is intended to preserve positive incentives for those defendants whose uses of a work are economically desirable; conversely, uses that would impose more costs than benefits should be discouraged.

The requisites of fairness arguably are satisfied also in the cases where the costs inflicted by the defendant’s behavior are greater than the profits it yields. In such instances, the choice is between tolerating an affirmative harm to the plaintiff (leaving damages uncompensated) and causing an affirmative harm to the defendant (requiring him to pay the damages). Restoration of both parties to the status quo ante is impossible. Because the proposed tort includes constraints aimed at eliminating surprise to defendants and ensuring knowing choices, it seems fair to hold a defendant to his choice. Thus, even if one is reluctant to characterize the “opportunities seized by the defendant” as a proper measure of the defendant’s gain, requiring him to pay a judgment in an amount equal to the damage he inflicted may be consistent with fairness.

⁴³² For example, including “costs saved” as an alternative measure of remedy has the virtue of providing compensation to creator-plaintiffs in cases where they suffer little loss from the defendant’s activity and calculation of the defendant’s allocable profit yields an uncertain or

among other things, the impact of information costs, varying enforce-

negligible amount. In such cases, plaintiffs can internalize some of the benefit traceable to their work by obtaining a judgment equal to costs saved. Such a judgment will be payable from any of the defendant's funds, including most notably the total profit (not merely the allocable profit) that the defendant's project yields. This is a prospect that seems responsive to the demands of the modified corrective justice model and should help create desirable ex ante incentives for creators. Yet there may be a problem with the "costs saved" criterion in regard to users' incentives, particularly when no equivalent to the plaintiff's work exists on the market.

It is important to preserve the defendant's incentives to engage in economically desirable uses—typically uses where the defendant's project causes the plaintiff little or no harm (perhaps because it brings desirable publicity to the plaintiff's work) and where the defendant is a creative copyist, using or adapting the plaintiff's work in a way that the plaintiff herself could not. Yet there will be cases where a use is economically desirable, but it would not be undertaken if the defendant had to bear the cost of making a work like the plaintiff's from scratch.

In a world where perfect information and the other conditions of perfect competition were present, this prospect would *not* discourage economically desirable uses of the plaintiff's work—the threat of having to pay a judgment equal to "cost saved" simply would encourage the potential user to seek a license, and if his expected profit exceeded the loss the plaintiff expected to bear as a result of the project, there is a range within which the two parties should be able to reach agreement on a price. No resort would need to be made to the court in such instances: the defendant would not infringe, out of fear of having to pay a "cost saved" money judgment, and the plaintiff would agree to license, out of fear that it would lose its chance to obtain a license fee based on the profits waiting to be made.

But in the imperfect real world there is a danger that economically desirable uses would indeed be chilled; for example, various problems can prevent bargains from being reached (problems that may not amount to significant enough market failures to constitute defenses to liability), and if a bargain is not reached the prospect of paying to reinvent the wheel may be great enough to prevent the potential user from continuing with his project. Further, to the litigants it may be uncertain whether a court will classify a particular intellectual product as an "eligible intangible" or as something that belongs in the public domain; socially useful applications of intangibles that should be in the public domain may be discouraged if the potential users face a threat of having to pay a judgment equal to "costs saved" that is greater than profit to be earned. If cases of chill are frequent, it therefore may be advisable to cap judgment awards of "costs saved" at an amount equal to the defendant's total (not allocable) profits from the project. But inquiries into profit are often difficult and contestable. If cases of chill are not frequent, the transaction costs of allowing this additional inquiry may not be worthwhile.

In addition, the cases where the "costs saved" measure will be useful are limited. They are instances where the defendant saved significant costs by using the plaintiff's product yet imposed little interference on the plaintiff's markets and earned little profit—cases, where, for example, the defendant used the plaintiff's product in an attempt to sell in the plaintiff's market that failed. There may be few cases of importance where the "costs saved" measure is in fact necessary to direct meaningful compensation to plaintiffs. For these reasons, it may not be worth the candle to make the "costs saved" measure an option.

But in the end it is easy to overstate the difficulties. It is my expectation that these high-end remedies rarely would be invoked and instead would serve to spur market formation.

ment probabilities, judicial institutional limitations,⁴³³ and the availability of supplemental remedial regimes such as criminal enforcement and supplemental awards such as attorneys' fee assessments. In addition, the remedy proposed here is tailored for potential users whose objectives are pecuniary; it is not well-adapted for persons with primarily nonmonetary motivations.⁴³⁴ Nevertheless, the usual remedial measures in the restitution cases⁴³⁵ do not respond well to the need, particularly sharp in the area of intangibles, to preserve *both* plaintiff and defendant incentives and to do so without overburdening the judiciary. An inquiry into the maximum value fairly attributable to what the defendant took is a better starting point for inquiry than more standard measures.

In sum, I tentatively recommend denying plaintiffs the option of receiving injunctive relief⁴³⁶ (a recommendation that is particularly strong in cases where free-speech issues are implicated) and instead

⁴³³ One relevant question would be the administrative cost of figuring a monetary award; at some point, use of injunctive remedies, or giving no remedies at all (e.g., fair use treatment) might be preferable. See Gordon, *Fair Use*, *supra* note 28, at 1622-24 (using criteria of institutional expertise to compare the merits of judicial price-setting versus judicial grant of free use).

⁴³⁴ For example, consider those cases where the defendant wants only to use the plaintiff's work (e.g., a satirist who is interested only in taking aim at the particular works he finds offensive) so that the concept of "money saved" is arguably irrelevant—there is no alternative resource for which he would have paid. In such cases, the measure of profit also may be irrelevant; expected monetary profit might be zero without dampening the user's desire to make the derivative work. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (author of book critical of the Warren Commission offered to pay all of his book profits to the corporation that owned the copyright in the Zapruder photos of the Kennedy assassination in order to obtain a license to use them, or drawings based upon them, in his book).

Some users who lack commercial motivations will do things to which the plaintiff objects (e.g., the satirist). As to such users, the remedy problem is of minor importance; because the tort contains a requirement that the plaintiff be willing to serve the defendant's market, most such defendants could not be sued successfully.

⁴³⁵ Even where a proportional measure of profit was used, the allocation was made on a basis that ignored the defendant's efforts, for instance, in discovering a cave, advertising it, and conducting tours through it. *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 1032 (Ky. 1936).

Note, however, that when a defendant misappropriates an item of fluctuating value, such as a share of stock, he may be required to pay that item's highest value. See *Dobbs*, *supra* note 158, at 404.

⁴³⁶ This is consistent with the Laycock position, for good reasons exist in the intellectual product area—such as the special importance of preserving creative defendants' efforts from being chilled—to refuse the plaintiff's choice of remedy. See Laycock, *supra* note 53, at 689 (injunctions should be unavailable where good reason exists to deny that choice of remedy).

giving plaintiffs an award of monetary relief as defined above. This tentative recommendation should provide a useful place of departure for future discussion of remedy issues in the intellectual product area.

IV. ON OWNING INFORMATION: APPLYING THE SET OF CONSTRAINTS

To illustrate the operation of the set of minimum criteria, I apply them now to two cases involving claims in information. The first illustration involves the fact pattern of the misappropriation suit that serves as the fountainhead of much of the recent case law applying reap/sow principles. The second examines how the set of criteria would apply to the facts of a recent copyright suit.

A. *International News Service v. Associated Press*

To recapitulate briefly: misappropriation as an independent tort usually is said to have begun with the 1918 case of *International News Service v. Associated Press*⁴³⁷ in which the United States Supreme Court upheld an injunction barring one news service from copying news from another “‘until its commercial value . . . has passed away.’”⁴³⁸ The Court’s decision had two primary bases. The first sounded in fairness: defendant INS endeavored to “reap where it has not sown,”⁴³⁹ helping itself to the “fruits” or “harvest” of AP’s time, effort, and money.⁴⁴⁰ The Court perceived this as unfair and unjust⁴⁴¹ and framed the rationale in arguably restitutionary terms. The Court called the plaintiff’s news “quasi property,”⁴⁴² as if referring to the unjust enrichment doctrine of quasi-contract and borrowed from the doctrine of constructive trusts the notion that one who has paid the price for property should have the benefit of its use.⁴⁴³

The second basis for the opinion was economic. The Court observed that the defendant’s copying interfered with the plaintiff’s

⁴³⁷ 248 U.S. 215 (1918).

⁴³⁸ *INS*, 248 U.S. at 245 (quoting injunction issued by the lower court) (emphasis omitted).

⁴³⁹ *Id.* at 239.

⁴⁴⁰ *Id.* at 239-41.

⁴⁴¹ *Id.* at 240.

⁴⁴² *Id.* at 242.

⁴⁴³ *Id.* at 240. The Court here ignored the point that news does not begin as property. As noted earlier in this Article, the restitutionary rules regarding treatment of labor differ from those involving property. See *supra* notes 220-25 & 368-79 and accompanying text.

business "precisely at the point where the profit is to be reaped,"⁴⁴⁴ and that such practices would render "profitless"⁴⁴⁵ any news-gathering enterprise. From this viewpoint, the injunction protected a valuable public service.

As a narrow economic matter, the *INS* Court stood on potentially strong ground. Without a right of action, the two news services could face something similar to a classic prisoner's dilemma:⁴⁴⁶ each could suffer greatly if it continued to invest in news-gathering while its competitor merely copied, yet there was the potential for mutual disaster if each copied and discontinued its own expensive news-gathering efforts, for there then would be no source for news. Prior to the dispute that gave rise to the lawsuit, the two entities resolved this dilemma through a custom of taking nothing but "tips" from each other.⁴⁴⁷ When *INS* was barred from Europe,⁴⁴⁸ however, it could not obtain first-hand information about the war for its readers. The rewards from copying and the costs of not copying grew large enough to upset the prior balance. Once one news service began to copy, the other might engage in retaliatory copying out of self-defense; at that point, legal intervention may have been necessary to preserve the entities from a destructive cycle. If only AP were injured, a decrease in service to the public would result, for *INS*, having been barred from Europe, could not fill AP's shoes.

The misappropriation doctrine currently applies in circumstances where no such disasters would follow from uncompensated use. Where the plaintiff and the defendant do not compete, there is no prisoner's dilemma problem; copying by one would create no immi-

⁴⁴⁴ *INS*, 248 U.S. at 240.

⁴⁴⁵ *Id.* at 241.

⁴⁴⁶ In a prisoner's dilemma game, each participant will gain if both cooperate, but either stands to gain even more if the other cooperates and he does not. Further, each stands to lose a great deal if he cooperates and the other does not. If neither cooperates, the loss to each is less than he would have borne had he cooperated and had the other not cooperated. As a result, when each party lacks the means to know or to influence the other's choice, both may decide not to cooperate, leaving both worse off than if each had cooperated. For a more precise description of this problem, see Davis, *supra* note 334, at 93; Charles J. Goetz, *Law and Economics* 12-17 (1984); Gordon, *Prisoner's Dilemma*, *supra* note 251.

⁴⁴⁷ *INS*, 248 U.S. at 243.

⁴⁴⁸ By one report, France prevented the Hearst Agency correspondents from obtaining the war news directly. Chafee, *supra* note 3, at 1310. By others, it was England that imposed a bar. Contemporaneous newspaper accounts spoke of a ban by the British government in 1916. See Kitch & Perlman, *supra* note 13, at 28-29.

ment danger for the other. Yet, some courts give misappropriation relief in the absence of competition.⁴⁴⁹ Instead of providing a remedy only in cases of extreme economic need where the demands of fairness are met, *INS* increasingly seems to serve as a precedent for a sort of natural right to property in the fruits of one's labor. Further, *INS* was decided before the advent of modern First Amendment doctrine. The majority clearly failed to consider adequately the free speech issues.

A misperception of "unjust enrichment" is helping to stretch the case beyond its bases in both fairness and economics⁴⁵⁰ and is encouraging modern courts to follow the *INS* majority in giving too short shrift to free speech and related dimensions of the public interest.⁴⁵¹ Restoring *INS* to its restitutionary origins might generate a more limited and defensible cause of action. Applying the limits of the hypothetical set of constraints outlined above would direct the courts toward considering the appropriate variables and thus would help to minimize the problems caused by, and to maximize the societal benefits generated by, a right of misappropriation.

The facts of *INS* illustrate both the application of the proposed set of minimum constraints and the need for additional limitations on the reap/sow principle. If the suit were brought today and the set of minimum constraints applied, AP could argue that the minimum requirements were satisfied in the following way:

Requirement (a) (knowing use): AP would suggest that *INS* knowingly used its news.

Requirement (b) (asymmetrical market failure): AP would suggest that because it lacked a lever with which to compel *INS* to pay for what it took, whereas *INS* easily could pay AP, asymmetrical market failure was present.

⁴⁴⁹ See, e.g., *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983) (holding Dow Jones entitled to bar use of its average as a reference point for a futures-trading contract, despite its own lack of interest in so utilizing the average).

⁴⁵⁰ *Id.* at 93 (Simon, J., dissenting) (stating that "[t]he majority is swayed by what it sees as 'unjust' enrichment"). Justice Seymour Simon argued that to make out the tort of misappropriation, there must be a combination of both unjust enrichment and competitive injury. *Id.*

⁴⁵¹ For example, the Supreme Court cited *INS* as a basis for granting the United States Olympic Committee an injunction against the use of the term, "Gay Olympic Games." *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 532, 541 (1987).

Requirement (c) (competition): AP would argue that it had sufficient nexus with the contested acts because AP and INS were in competition, as were their respective affiliated newspapers.

Requirement (d) (nonreciprocity): AP would argue that INS's use was substantial and not something AP likely would wish to do.

Requirement (e) (plaintiff's stake): AP would suggest that it had gathered the news deliberately and with an intent to capitalize on it commercially.

Requirement (f) (demarcation): AP would suggest that INS was proceeding despite AP's protests, thus establishing a satisfactory substitute for demarcation.

Requirement (g) (other suitability): AP would point to the fact that the two parties already were in the business of marketing news, thus establishing its suitability as an item of commercial exchange.

In defense, INS likely would concentrate on a few selected avenues. Regarding requirement (c) (nexus and competition), INS first might contend that, although the two news services and their affiliated newspapers competed in some aspects of their enterprises, AP did not in fact stand ready to serve INS's market. Subscribers to INS papers arguably preferred the point of view that those newspapers provided and would not find AP newspapers an adequate substitute. Even if the readers of INS papers would have been willing to switch to AP papers, INS might be able to show that "a large part of the readers" of the INS papers "were so situated that they could not secure prompt access to papers served by the Associated Press."⁴⁵² INS would contend that the two parties could be considered in competition only if AP were to sell its news to INS papers or to those papers' customers and that, unless AP were to find some means to do so, its claim should be barred.

A related defense lies with the requirement of asymmetrical market failure (requirement (b)). Even if INS conceded that AP faced a market failure, it could contend that as a defendant it faced a market failure as well: AP's likely unwillingness to license INS's use of the

⁴⁵² *INS*, 248 U.S. at 264 (Brandeis, J., dissenting).

news. Conceivably, INS might be able to show that, if given an injunction, AP would refuse to license at virtually any price;⁴⁵³ AP might wish to use the power resulting from the injunction to impair INS's viability as a competitor,⁴⁵⁴ or perhaps AP's bylaws were so restrictive that INS papers would be unable to achieve membership.⁴⁵⁵ If such a showing could be made, requirement (b) would be unsatisfied, for that constraint requires *both* that the plaintiff faced market failure *and* that the defendant did not. If the defendant faced market failure, the defendant would prevail.

INS also would have an argument regarding requirement (g) (market suitability). The requirement of market suitability underlines the open-ended nature of the additional inquiries that might be necessary in individual cases. INS might argue that news production clearly requires additional inquiry, for since 1918 news has come to be seen as implicating First Amendment values.⁴⁵⁶ Furthermore, restricting the flow of news may harm third parties by rendering future generations less able to deal with their environment than predecessors had been.⁴⁵⁷ The requirement of market suitability demands more than proof that the intangible has been traded or could be traded. Instead, it asks courts to address the normative and constitutional issues raised by imposing an obligation of payment in this context and for this kind of intangible.

INS would argue that the court must distinguish between markets tolerated by the legal system because they evolved from existing legal and physical advantages that implicate no controversial normative or

⁴⁵³ See Gordon, Fair Use, *supra* note 28, at 1632-35 (arguing that authors' antidissemation motives are a form of market failure). Under current law, such behavior might constitute an antitrust violation. See *Associated Press v. United States*, 326 U.S. 1, 14-16 (1945).

⁴⁵⁴ Cf. *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980) (allowing newspaper to use copies of *TV Guide* cover in comparative advertising to promote a competing publication).

⁴⁵⁵ See *INS*, 248 U.S. at 264 n.1 (Brandeis, J., dissenting). In fact, AP later was found to be in violation of the antitrust laws by improperly restricting both its membership and the dissemination of news by its members. See Ralph S. Brown & Robert C. Denicola, *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works* 547 (5th ed. 1990).

⁴⁵⁶ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The courts are not always sensitive to the free speech dimensions of intellectual property problems, however. See Dreyfuss, *supra* note 63, at 410-12.

⁴⁵⁷ See Gordon, Equality, *supra* note 64.

constitutional issues,⁴⁵⁸ and markets that exist only if the legal system gives an explicit right in a given intangible. After all, tolerating markets requires a different decision than giving legal rights.⁴⁵⁹ The grant of an explicit right might implicate justice or the Constitution in a way that toleration of an existing market might not.⁴⁶⁰ Even if a news service successfully reaps profits by physically denying access to those newspapers that have not paid its price,⁴⁶¹ the news may not be an appropriate subject for an explicit grant of legal rights. Thus, the possibility that news services may be able to exploit local physical exclusivity or lead-time advantage to obtain profits from selling news does not foreclose the “market suitability” issue.⁴⁶²

INS and AP would be making arguments both about the facts and about the proper interpretation of the hypothesized set of constraints. Attention to such questions would have better served both the public weal and the foundations of the reap/sow principle than did the Court’s too-quick assumption that one who pays the price should have the benefit.⁴⁶³ The issue of competition in the relevant market (requirement (c)) would have directed the Court’s attention to the welfare of those third parties—subscribers to INS-affiliated newspapers—who stood to be affected adversely by granting AP a right over the news. This would have helped to widen the majority’s field of vision beyond its narrow focus on only the two named parties, an

⁴⁵⁸ See Gordon, *Inquiry into the Merits*, supra note 37, at 1400-05, 1465-69 (markets in intangibles evolve as byproducts of physical advantages). But cf. Robert Nozick, *Anarchy, State, and Utopia* 153-60 (1974) (comparing historical principles and end-result principles of “patterned” justice).

⁴⁵⁹ For example, it is lawful to bribe a noisy neighbor to be quiet even if one lacks a legal right to have a court or a policeman quiet him. In fact, it commonly is argued that it is important to allow persons to “bargain around” legal rules. Cf. Ronald H. Coase, *The Problem of Social Cost*, 3 *J. L. & Econ.* 1 (1960).

⁴⁶⁰ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964) (suggesting that judicial enforcement of private right of action for libel implicates issues of free speech). In some unusual contexts, attempts to enforce purely private consensual arrangements will implicate constitutional issues. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (denying state judicial enforcement of a racially restrictive covenant on Fourteenth Amendment equal protection grounds).

⁴⁶¹ “I will keep you from seeing the news I have gathered in a timely fashion unless you join my association or pay my fees.”

⁴⁶² Copyright law is instructive here. Although the exact wording of a news item might be suitable for a copyright, the underlying substance of the news would not be. Cf. 17 U.S.C. § 102(b) (1988) (copyright protection does not extend to ideas).

⁴⁶³ See *INS*, 248 U.S. at 239-41.

aspect of the opinion that long has troubled commentators⁴⁶⁴ and that was one of the concerns that motivated Justice Louis Brandeis to dissent.⁴⁶⁵

Attention to asymmetrical market failure (requirement (b)) also might have served to bring Justice Brandeis and the majority closer together. Brandeis suggested that because the news implicated public interest considerations, any grant of rights in news might have to be conditioned upon a legislatively authorized compulsory license.⁴⁶⁶ Had the majority carefully considered the possibility that AP would refuse to sell INS a privilege to copy the news—the issue that INS would raise pursuant to requirement (b)—the majority also might have concluded that supervision of the AP-INS relationship would be necessary to ensure the public's continuing access to information about the ongoing war. This, in turn, would have led the Court to consider directly whether supervision of this relationship was an appropriate expenditure of judicial resources or whether a different branch of government could better manage the relationship. Attempting to “make a market” in war news was a possibility; a court could, for example, deny an injunction and set an amount of monetary recovery to be paid regularly to AP as long as INS utilized the news.⁴⁶⁷ But such a course of action could burden the judiciary beyond the limits of its institutional competence.⁴⁶⁸ Explicit consider-

⁴⁶⁴ See, e.g., Mashaw, *supra* note 99, at 1159-60.

⁴⁶⁵ See *INS*, 248 U.S. at 262-63 (Brandeis, J., dissenting).

⁴⁶⁶ *Id.* at 266-67 (Brandeis, J., dissenting) (stating that a legislature might conclude that the proper remedy includes the recovery of fixed damages and might refuse to issue an injunction).

⁴⁶⁷ Cf. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (ruling that an injunction barring the defendant from operating a noisy and dust-emitting cement plant would be vacated if defendant paid permanent damages to neighboring landowners). Note that where the defendant faces market failure, award of a reasonable royalty (fair market value) may be appropriate, as may be a privilege of free use. See Gordon, *Fair Use*, *supra* note 28 (exploring both alternatives and cautioning that institutional limitations often have persuaded courts to prefer granting a liberty to copy rather than endeavoring to set prices). A monetary award of an amount equal to the *highest* price the defendant would have paid would be excessive when the defendant has no market alternative. Compare the discussion of remedy, *supra* notes 318 & 412-36 and accompanying text.

⁴⁶⁸ Commentators argue not only that restitution courts seek to avoid the extensive burdens that might be involved in overseeing such market-making, see Dawson, *supra* note 13, at 1418, but also that a desire to avoid valuation problems motivates them. See Levmore, *supra* note 38, at 72; see also Wade, *supra* note 174, at 1186-90 (arguing that a measurable benefit or burden is required for the imposition of liability).

ation of the issue might have led the majority to share Justice Brandeis' conclusion that adequate resolution required legislative action.

That the set of minimum constraints might lead to legislative rather than judicial resolution in certain contexts is a virtue rather than a flaw in the analysis. It demonstrates that the set of constraints can help courts identify where the reap/sow principle may be an unsatisfactory basis for judicially granted rights.

Adoption of the recommended set of constraints would, at a minimum, have kept later courts from taking out of context the opinion's reference to "quasi-property"—a phrase merely restitutionary in origin that has been used to justify property treatment for information.⁴⁶⁹ Use of the constraints would have focused the opinion more directly on the relevant variables and would have provided better guidance for future cases.

B. *West Publishing Co. v. Mead Data Central: Rights in Page Numbers*

Cross-citing across various published versions of case reports long has been a useful practice. For example, the Supreme Court reporter published by the Lawyers Co-operative Publishing Company tells the reader where to find particular language in the official United States Reports. When Mead Data offered to provide in its on-line LEXIS service cross-cites to the interior of judicial opinions appearing in West case reports, however, West sued.⁴⁷⁰

Under conventional copyright principles, West had a copyrightable compilation in its volumes of case reports: West had arranged the judicial opinions, and though West had no copyright in the opinions

⁴⁶⁹ In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that a reporter's use of his newspaper's prepublication information to make a profit for himself violated the mail- and wire-fraud statutes. Under the statutes then in force, simply showing that the reporter violated a "contractual right to his honest and faithful service" would not have resulted in conviction. *Id.* at 25. Rather, the violation of a property right was required. *Id.* Relying in part on *INS*, the Court deemed irrelevant whether the reporter's scheme "interfere[d] with the Journal's use of the information" or caused it monetary loss. It held that the newspaper had a property interest and the reporter had denied the paper the "exclusivity" that property should bring. *Id.* at 26-27. But *INS* does not establish a right to exclude; even if one accepts the reap/sow principle, the preceding analysis makes clear that the *Carpenter* opinion ignores the difference between a right to reward and a right to property.

⁴⁷⁰ *West Publishing Co. v. Mead Data Cent.*, 799 F.2d 1219 (8th Cir. 1986) (affirming a preliminary injunction order against Mead Data's use of page cites in its LEXIS service), cert. denied, 479 U.S. 1070 (1987).

themselves, no one could copy an entire volume's arrangement without infringing West's copyright. But nothing theretofore known in copyright law gave West a copyright in the page numbers themselves, nor was there clear precedent establishing that copying page numbers infringed on West's copyright. Nevertheless, West obtained a preliminary injunction against Mead Data. The following discussion briefly explores how a state court might have handled the controversy utilizing the approach this Article has outlined, assuming for the sake of argument that there was no copyright law or other source of federal preemption.⁴⁷¹ After *Feist Publications v. Rural Telephone Service Co.*,⁴⁷² such controversies may find their way to state court.⁴⁷³

The fact pattern may satisfy the proposed set of minimum constraints. In the absence of a copyright statute, West well might argue that the set of constraints would permit compensating it for this commercial use of its page numbers. Mead Data knowingly used the page numbers in competition with West in circumstances where it knew West claimed an ownership interest in them, meeting requirements (a) (knowing use), (c) (competition), and arguably (f) (demarcation). The use was substantial and not likely to be reciprocated, meeting requirement (d) (nonreciprocity). West arguably faced a market failure (short of being granted a legal right, it had no lever with which to block Mead Data's access to the page number information⁴⁷⁴ and no lever with which to obtain payment from customers who obtained West-generated information via Mead Data's LEXIS terminals), and Mead Data did not face market failure (it easily could have sought a license from West), possibly meeting requirement (b) (asymmetrical market failure). West produced the page numbers as a part of a deliberate productive effort for which it expected to be paid, possibly meeting requirement (e) (plaintiff's stake).

⁴⁷¹ Note that West chose the page numbers in the West case reports. Nevertheless, the page numbers are facts, like addresses in a telephone directory, telling lawyers where to find particular judicial language. Had the *Mead Data* decision been decided after *Feist Publications v. Rural Telephone Serv. Co.*, 111 S. Ct. 1282 (1991), quite possibly the Court would have reached a different outcome and would not have found a federal copyright infringement.

⁴⁷² 111 S. Ct. 1282 (1991).

⁴⁷³ See *supra* notes 20-22 and accompanying text.

⁴⁷⁴ I am assuming here that the usual public goods problems that afflict intellectual property will suffice to explain why West's "freedom" not to sell the reporters at all would not count as a usable lever. See *supra* notes 331-35 and accompanying text.

There are some discrepancies, however, between the *Mead Data* facts and the proposed set of constraints. Perhaps West did not "deliberately create" the page numbers within the meaning of requirement (e). West certainly cared about its page numbers after the dispute arose, but prior to that time West probably was indifferent to which paragraph of a judicial opinion appeared on which page.

The major problem with the *Mead Data* decision sounds in requirement (g): the decision may curtail a democracy's access to its own law.⁴⁷⁵ In the short run, *Mead Data* has the money to obtain a license from West,⁴⁷⁶ but future law publishers may not.

This problem has both economic and noneconomic dimensions. A complex economic analysis of the market structure prevailing at the time new publishers entered the field would be needed to determine whether West's ownership of its page numbers would restrain, or would help to achieve, value maximization.⁴⁷⁷ I suspect that ownership would retard rather than promote allocative efficiency under most likely scenarios. If it did retard efficiency, West's ownership claim would increase the cost of access to law. Much admirable progress has been made in the opposite direction (increasing the ease with which the poor can use the law) over the past few years, and, in my view, this should not be reversed.

Further, destructive synergies sometimes follow from pricing goods in which there is a high public stake.⁴⁷⁸ Records of judicial opinions

⁴⁷⁵ See Patterson & Joyce, *supra* note 406 at 809-13.

Another problem with the decision arises under copyright law. Arguably, the court ignored the legislative boundaries that make copyright law tolerable. The Copyright Act protects only designated works of authorship; page numbers themselves are not works of authorship. At most, use of the page numbers gave access to West's protectable compilations, but the Act does not proscribe giving access to a copyrighted work. See 17 U.S.C. § 106 (1988) (listing exclusive rights in copyrighted works). Yet the court ruled that there was an actionable infringement. The importance of boundaries to intellectual property may be a reason for favoring legislative over judicial resolution of intellectual product questions; it also is a reason for courts to hew closely to the existing boundaries.

⁴⁷⁶ Patterson & Joyce, *supra* note 406, at 722.

⁴⁷⁷ At first blush, giving ownership of page numbers to West may appear to increase the cost of access to law. But giving West this ownership enables it to collect license fees from *Mead Data*; although this transfer payment may increase the price a lawyer must pay for a LEXIS subscription, it may decrease correspondingly the prices that West charges its customers. The issue needs empirical investigation.

⁴⁷⁸ For an interesting view, consider Rose, *supra* note 408, at 777-81 (arguing that "inherently public property" may be necessary if members of the public are to deal productively with each other).

are a form of law, and access to law unencumbered by intellectual property rights may be something that society values for its own sake.

Many goods should not be traded commercially,⁴⁷⁹ and there are many possible bases for a belief that not all resources should be owned. For example, an egalitarian may believe that all are entitled to an equal chance to the "good life" and may believe that free use of certain goods (such as affection, air, law, and fundamental ideas) is essential to the good life. Or one might believe that, however much private parties should be free to exchange such goods among themselves on whatever terms they deem appropriate, the courts would create significant social tension by putting prices on these goods and enforcing these restrictions. Or one might believe that no one deserves ownership in something she makes out of the common heritage unless she leaves "enough, and as good" for others; because there is little "as good" as air, law, and the fundamental tools of art and science, these things might be incapable of ownership.⁴⁸⁰

Perhaps standards in general should be ineligible for ownership, whether they be West page citations, which have become standards in legal practice and scholarship, or computer user interfaces,⁴⁸¹ golf-handicapping formulae,⁴⁸² or stock market indices⁴⁸³ that have become standards in their respective fields. This limitation can be justified on several grounds. Designation as a "standard" grants additional economic value not attributable to the intangible's original merits: something may become a standard simply because of temporal priority and not because of excellence; once something is a standard,

⁴⁷⁹ See Calabresi & Melamed, *supra* note 297, at 1111-15 (discussing inalienability). Sexual favors are the usual example of goods that should not be sold. Others might include air to breathe, the use of perspective in art, the theory of relativity in physics, or the form a symphony takes. Still another might be law.

⁴⁸⁰ This argument, derived from Locke, is developed further in Gordon, *Equality*, *supra* note 64, at 19-24 (discussing the Lockean proviso); see also Hughes, *supra* note 374, at 296-329 (discussing a Lockean justification for the ownership of intellectual property).

⁴⁸¹ See *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 68 (D. Mass. 1990) (holding copyrightable the user interface of Lotus 1-2-3). The court was unreceptive to defense arguments regarding standardization. *Id.* at 71.

⁴⁸² *United States Golf Ass'n v. St. Andrews Sys., Data-Max*, 749 F.2d 1028, 1040-41 (3d Cir. 1984) (refusing to enjoin the use of the plaintiff's formula for calculating golf handicaps and treating as a relevant consideration the formula's role as an industry standard).

⁴⁸³ See *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983) (holding that plaintiff is entitled to bar use of its average as the basis for defendant's stock index futures contract).

there is nothing "as good" available;⁴⁸⁴ a standard, if owned, could have a quasi-monopolistic advantage in the market over its competitors; intangibles do not become standards until they have long been successful, and, at that point, the producer's investment in research and development long may have been paid back; and the public begins to rely on a standard in a way that might give users a claim, analogous to estoppel,⁴⁸⁵ to employ the standard when substitutes are unavailable.

My primary point here is not to argue for any particular content to the list of ineligible intangibles. Rather, I am illustrating that no restitutionary right is complete without protection for the public interest, and arguing that no case as yet has fully worked out such protection.

CONCLUSION

The courts use "fruits of labor," "reap/sow," and other unjust enrichment arguments to bestow new wealth upon certain creators. Though restitutionary considerations long have played a role in Anglo-American judge-made law, in the last twenty years the restitutionary impulse has acquired new force. The recent trend in intellectual property rights finds that all appropriations are in danger of being treated as *misappropriations* and that the interdependence upon which our cultural life rests is on the verge of becoming a cash-and-carry operation. I speculate that judges may feel no need to examine the trend because the restitutionary notion that one deserves to keep the "fruits of his labor" seems so evidently correct, so evidently in accord with traditional notions of corrective justice and traditional conceptions of the judicial role, that giving legal protection to intellectual products appears to require no special justification. Yet, in my view, the traditional protections for intellectual products (copyright and patent statutes; trademark law limited to securing for consumers protection from confusion; and protection of trade secrets) likely provide sufficient incentives and structure to keep the intellectual product

⁴⁸⁴ See Dreyfuss, *supra* note 63, at 418 (arguing if a trademark's use is "rhetorically unique within its context," the trademark owner should not be permitted a right of action against its use in that context). Consider also my interpretation of the Lockean proviso. See Gordon, *Equality*, *supra* note 64, at 19-24.

⁴⁸⁵ Some have argued that reliance claims can give rise to property. See Singer, *supra* note 98, at 1026-31. The argument that something should be in the public domain and open for all to copy is equivalent to arguing that it should be the property of the public.

industries healthy, and the new protectionism chills more creativity than it induces.

If corrective justice notions are the basis of the recent opinions, standing alone they do not bear the requisite weight. Protecting a current balance of community advantages and implementing community norms should not lead directly to identifying all free riding as "wrongful gain." Such a prohibition is itself potentially destabilizing, and, though it may express one community norm, important contrary community norms exist as well.

The largest possibility of disruption applies beyond the immediate parties to a given suit. Giving AP a right against INS can deprive a significant number of newspaper readers of the news; requiring an information producer to reinvent the wheel may prevent the making of a valuable new product.⁴⁸⁶ Any award of an intellectual property right likely will increase price and, consequently, decrease access to the work.⁴⁸⁷ All of these effects shift the direction of a society's effort.

Most applicable norms caution against the unrestrained impulse to reward creators for the benefits they generate. Ask a lawyer about West's suit to restrain Mead Data from providing jump cites in LEXIS to the judicial opinions published by West in the standard reporter series referenced by all lawyers and judges daily.⁴⁸⁸ Ask a computer professional about Lotus' suit to prevent others from using spreadsheet interfaces with elements similar to theirs.⁴⁸⁹ Ask a comic book reader about Disney's suit to restrain a parody of Mickey and Minnie.⁴⁹⁰ Many members of the relevant communities will report that the plaintiffs have gone too far and that they are trying to control what should be free.⁴⁹¹

⁴⁸⁶ Cf. Robert A. Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569 (1963) (arguing that the collection of facts such as newspaper articles should have narrower judicial protection than literary or artistic works in order to avoid "wasteful duplication of effort" by later authors).

⁴⁸⁷ See Landes & Posner, *supra* note 27, at 18.

⁴⁸⁸ West Publishing Co. v. Mead Data Cent., 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987).

⁴⁸⁹ Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37 (D. Mass. 1990) (plaintiff Lotus prevailed).

⁴⁹⁰ Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (plaintiff Walt Disney prevailed), cert. denied, 439 U.S. 1132 (1979).

⁴⁹¹ On the West case, ask one's lawyerly self. On the Lotus cases, see, e.g., Activists to Picket Lotus Headquarters, InfoWorld, July 30, 1990, at 38; David Bunnell, The Software Inquisition, Macworld, May 1987, at 19, 22. On the Air Pirates case, see Stewart Brand, Dan

Unfortunately, these other norms are difficult to articulate, whereas “reaping and sowing” comes neatly to the tongue. Further, litigation contains a structural bias against the articulation of a community interest in free access, for the community as such cannot be a litigant. Against an articulate plaintiff who is enunciating what sounds like a moral interest in reaping what she has sown often stands a commercially motivated defendant who may be an unsympathetic figure poorly situated to communicate what the community has at stake.⁴⁹² Spokespersons for the community interest in *nonownership* exist,⁴⁹³ but, given the likely structure of the relevant litigation, their voices may go unheard.

The underlying theme here is the inherent contradiction in any legal principle that protects expectations for their own sake. Choices between interests and expectations continually must be made; frustration and change inevitably will result. This reality suggests that Justice Holmes was right in *INS* and his brethren wrong: if a reap/sow principle is to be advanced, it cannot rest on protecting what “is.”

I suggest an alternative conception of the reap/sow principle: a contextual and contingent outgrowth of the entitlement not to use one’s labor. In restitution, courts have dealt with persons who have conferred their labor on others without preexisting obligation, much as intellectual property producers send the products of their labor into the world. Restitution’s doctrines have alerted us to circumstances under which it might not be appropriate to grant rights to be paid for voluntary past labors.

The approach has suggested some minimum requirements for bringing suit on restitutionary principles. One element extrapolates from restitution’s concern that the provider of benefits not be officious—a requirement that the plaintiff have some good excuse for not having sought the beneficiary’s advance consent. A linked element emerges from the policy that, however good the excuse, the laborer’s

O’Neill Defies U.S. Supreme Court: A Really Truly Silly Moment in American Law, *CoEvolution Q.*, Spring 1979, at 4. On the use of community norms generally, see Weinreb, *supra* note 100, at 1161.

⁴⁹² See, e.g., *Martin Luther King, Jr., Ctr. for Social Change v. American Heritage Prods.*, 296 S.E.2d 697, 706-09 (Ga. 1982) (Weltner, J., concurring) (arguing that the majority enunciated an overly broad right of publicity when the proper focus should have been the unconscionability of the individual defendant’s behavior).

⁴⁹³ See, e.g., *Lange*, *supra* note 10.

resort to the courts should not impose heavy burdens on the judiciary, such as overseeing the licensing decisions of an entire industry. Also among the relevant policies are the desire to ensure that a defendant truly will be benefited by the item conferred, that he will not suffer a net harm as a result of an obligation of payment, and that his autonomy will be respected. These considerations yield a set of suggested requirements. I suggest that a plaintiff be required to show, among other things, that she faced a market failure; that granting her a right of payment would motivate users to negotiate with her and persons like her and encourage markets to form; that she had marked her product in such a way that the defendant would know a charge for use would be imposed; and that the defendant deliberately used the product. In addition, I suggested that a nexus is needed between the producer and the particular use for which payment is sought. The producer's claim of entitlement should not extend beyond the benefits she foreseeably generated, or, alternatively, beyond the markets she is prepared to serve. This latter contention found its application in a requirement that the defendant and the plaintiff be in actual or expected competition. Further, I argued against the use of property nomenclature to describe the resulting rights.

I stressed, however, that the normative concerns drawn from unjust enrichment law are not sufficient to protect the public interest when intangible products such as information are involved. Unjust enrichment's normative concerns are both party-oriented (fairness) and economic (administrative costs, incentives, and market preservation), all of which are relevant sets of issues for intellectual products. Intellectual products, however, tend to have greater effects on the public and raise more complex normative questions than do the subject matters at issue in ordinary restitution cases. The search for boundaries to confine the reap/sow principle has yielded some results, but the set of constraints is necessarily far from complete.

An inquiry into unjust enrichment cannot accomplish all things. The proposed set of constraints does not describe with specificity the particular acts that would constitute actionable copying of an eligible intangible, nor does it provide a list of those intangibles that would be eligible or ineligible for protection. Too many varying norms are implicated by the differences among particular intangibles to provide complete answers.

The resulting uncertainty may mean that socially desirable and potentially noninfringing creative uses of prior works could be chilled even if courts incorporated the restraints into their definition of misappropriation. Conversely, lack of certainty about protection might dampen the positive incentive effects that such a cause of action might otherwise have for potential plaintiffs. Further, the uncertainty may mean that liability will take some defendants by surprise. Even a careful tailoring of remedy to avoid imposing a net harm on defendants may not eliminate the resulting unfairness. These considerations reinforce the importance of advance specification of boundaries. Legislatures likely will continue to be the best institutions for implementing protection for intellectual products, even if the reap/sow principle proposed here were considered an appropriate and adequate basis for protection.

My primary goal has been to illuminate some features of the wide crevasse that exists between a moral perception that reward may be due, and a legal regime implementing such rewards. Courts considering claims over intellectual products sometimes write as if "reaping and sowing" and "unjust enrichment" automatically give rise to absolute claims, trumping all other considerations. Yet the judicial experience in the allied area of restitution has suggested that economic and other norms should, and do, condition the implementation of the impulse to grant reward for labor expended.

