

MISAPPROPRIATION AND THE MORALITY OF FREE-RIDING

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ABSTRACT

Concern about free-riding drives intellectual property law, especially its misappropriation doctrine. Freely enjoying goods that are costly to produce may be bad for society as a whole (because it weakens private incentives to create such goods) and also unfair to those who have created them (because they are not compensated for all the value they produced). In recent decades, courts in misappropriation disputes have focused exclusively on the incentives worry, believing the fairness worry yields an unbounded misappropriation doctrine that conflicts with and is preempted by copyright law.

But this view misunderstands the morality of free-riding. Whether free-riding is morally objectionable depends on the particular characteristics of the free-rider, not the fact of free-riding alone. And under copyright case law, that means the misappropriation doctrine can be based on ethics and yet not preempted. A better understanding of free-riding's moral dimensions helps repair a now broken doctrine, and more than that shores up intellectual property law's broader response to one of its driving concerns.

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INTRODUCTION

For the past few years, Rupert Murdoch has been on a crusade. In his sights are free-riders who purportedly lack all respect for the rights of others. To assemble or "aggregate" news items without permission, says Murdoch, is to commit "theft."¹ Those who build an entire business on news aggregation are "content kleptomaniacs."²

Admittedly, Murdoch's moral authority on this subject may be doubted.³ The popularity of his position, however, is plain to see. News aggregators, whose ranks have included *The Huffington Post* and Google News, often attract criticism when they try to profit from others' news stories for free. Such free-riding amounts to theft or piracy in the eyes of critics who are convinced that the work necessary to produce the news entitles the laborers to a property right in their product.

Ironically enough, in advancing this position, these critics are themselves enjoying the fruits of others' labors. No one worked harder than Melville Stone and his organization, the Associated Press, to popularize the view that news is property that is stolen or "misappropriated" when it is used freely.⁴ Stone set out to right what he saw as a clear moral wrong.⁵ And so he litigated the issue all the way to the Supreme Court, which he convinced to see things his way. In the famous 1918 case, *International News Service v. Associated Press*, he persuaded a majority of the Supreme Court to enjoin the free-riding of one of the

1. Mercedes Bunz, *Rupert Murdoch: 'There's No Such Thing as a Free News Story,'* THE GUARDIAN (Dec. 1, 2009, 12:58 PM), <http://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news>.

2. Alistair Dawber, *Murdoch Blasts Search Engine "Kleptomaniacs,"* THE INDEPENDENT (Oct. 10, 2009), <http://www.independent.co.uk/news/media/online/murdoch-blasts-search-engine-kleptomaniacs-1800569.html>.

3. See Mike Masnick, *A Look at All the Sites Owned by Rupert Murdoch That "Steal" Content*, TECHDIRT (Nov. 11, 2009, 9:57 AM), <https://www.techdirt.com/articles/20091111/0049546883.shtml> (listing aggregator sites owned by Murdoch).

4. See, e.g., Douglas G. Baird, *The Story of INS v. AP: Property, Natural Monopoly, and the Uneasy Legacy of a Concocted Controversy*, in INTELLECTUAL PROPERTY STORIES 9, 11 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

5. MELVILLE E. STONE, FIFTY YEARS A JOURNALIST 357 (1921) ("There were equities involved, and I had learned in the days when I studied law that there was no wrong which the arm of the chancellor was not long enough to reach.").

AP's main competitors on the theory that the free-riding was "unfair competition," even though it was lawful under the federal copyright statute.⁶ The Court thus recognized a "quasi property" right in the news among fellow members of the news industry.⁷ Because the Court thought it unethical for a newsgathering organization to "reap where it has not sown,"⁸ it established that such organizations may not copy their rivals' news for free.

This notion that free-riding is unethical has done much to influence the shape of modern intellectual property law. The AP and other news companies have used *INS* to sue those who try to profit from their news.⁹ Beyond the news, the *INS* misappropriation doctrine has generated novel rights in a variety of subject matter.¹⁰ Beyond the misappropriation doctrine in particular, still other expansions in intellectual property rights may be traced to an instinctual disapproval of free-riding.¹¹

But despite the influence that anti-free-riding sentiments have had, no one has offered much of a justification for them. Much criticism of free-riding is nothing more than name-calling. Nor has there been much pushback from the other side. Even those who reject the misappropriation doctrine readily concede that free-riding is morally dubious.¹² Almost no one in the debates over misappropriation, then, seriously questions the idea that free-riding is unethical.¹³

6. 248 U.S. 215, 233, 240 (1918).

7. *Id.* at 236.

8. *Id.* at 239.

9. *E.g.*, Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009); Complaint, Associated Press v. Meltwater U.S. Holdings, Inc., No. 12 Civ. 1087 (S.D.N.Y. Feb. 14, 2012); Jonathan Stempel, *Dow Jones, Briefing.com Settle "Hot News" Lawsuit*, REUTERS (Nov. 16, 2010, 9:41AM), <http://www.reuters.com/article/2010/11/16/us-briefingcom-dowjones-hotnews-settleme-idUSTRE6AF37G20101116>.

10. *See infra* Part I.

11. *See, e.g.*, David J. Franklyn, *Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law*, 56 HASTINGS L.J. 117, 132 (2004); Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 146–56 (2010).

12. *E.g.*, *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 257 (1918) (Brandeis, J., dissenting) ("To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgement, may be inconsistent with a finer sense of propriety."); *id.* at 262 ("The injustice of such action is obvious."); Andrew Beckerman-Rodau, *Ideas and the Public Domain: Revisiting INS v. AP in the Internet Age*, 1 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 22 (2011) ("Legally prohibiting free riding is facially appealing because it comports with notions of fairness."); Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 189 (1936).

13. One noteworthy exception is Wendy Gordon. *See* Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411, 2423 (2009) [hereinafter Gordon, *Gleaning*]; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 169 (1992) [hereinafter Gordon, *Restitutionary Impulse*]. Yet even she holds that a laborer is entitled to the fruits of his or her labor in a large range of the relevant cases. *See* Gordon, *Restitutionary Impulse, supra*, at 186–87 & n. 141 (arguing that, other things equal, someone owes compensation when (1) he deliberately uses another's product (2) without improving it (3) while knowing that the

To some degree, this lack of questioning is not as surprising as it first appears. Courts have mostly stopped formulating misappropriation doctrine in overtly moral terms. They have done so, at least in part, in response to the possible conflict between misappropriation and copyright law. Misappropriation is a state law doctrine.¹⁴ It is also arguably inconsistent with federal copyright law, which allows the copying of pure facts and only protects particular modes of expressing them.¹⁵ Copyright thus offers no assistance to newsgathering organizations like the AP when rivals copy their news. Misappropriation doctrine, on the other hand, can forbid the copying of factual information, and it departs from copyright law in further ways, too. When it does, it is potentially preempted by the federal copyright statute because federal law must prevail over state law in any conflict between them. Because of this conflict, courts started to turn away from ethics-focused accounts of misappropriation doctrine, which, in all fairness, have historically been broad and open-ended and so quite a threat to federal copyright policies.¹⁶ As the main legal issue in misappropriation cases became preemption, courts decided that they had no cause to think much about ethics-based accounts of the doctrine.

The turn away from ethics was cemented when the Second Circuit endorsed an alternative normative account of the doctrine. In *National Basketball Ass'n v. Motorola, Inc.*, the court announced that *INS* was “not about ethics” after all; it was about providing incentives for private parties to invest in making the news available to the public.¹⁷ Under *NBA*, free-riding is objectionable to the extent that it has negative consequences for society, regardless of whether it wrongs the plaintiff morally. In an effort to save some version of the doctrine from preemption, the court gave a novel, five-element test for a valid, non-preempted misappropriation claim, without any reliance on moral considerations.¹⁸ And ever since, the incentives-focused account of misappropriation

producer wants compensation for such use, and (4) the amount to be paid is less than the value he derives through the use).

14. The *INS* Court created misappropriation doctrine as a part of the general common law. After the Supreme Court abolished federal courts' general common law powers in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), misappropriation doctrine has had to be addressed by individual states. See, e.g., *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 663 (2d Cir. 1955); *Intermountain Broad. & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 321–22 (D. Idaho 1961); *Loeb v. Turner*, 257 S.W.2d 800, 803 (Tex. Civ. App. 1953).

15. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–51 (1991) (holding that names, towns, and telephone numbers were not copyrightable.).

16. See, e.g., *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1533–36 (S.D.N.Y. 1985) (“As for misappropriation, Mayer asserts that there is in fact an extra element that will save the action from preemption—commercial immorality. But it is hard to see how this is an extra element. . . . If, however, it is an extra element, it is not the type that would save the action from preemption.”).

17. 105 F.3d 841, 853 (2d Cir. 1997).

18. *Id.* at 852.

has set the terms of debate.¹⁹

That is not to say, however, that the debate ended with *NBA*. On the contrary, the Second Circuit has recently distanced itself from *NBA*'s formulation of the misappropriation doctrine. In *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, the court rejected the circuit's homegrown five-element test as mere dictum, unnecessary to the outcome in *NBA*—and without so much as offering a replacement.²⁰ The court did indicate that some unspecified misappropriation claim, closely tracking the facts of *INS* itself, would probably avoid preemption.²¹ Thus the misappropriation doctrine survives alongside copyright, but no one knows in what form.²²

This article offers a solution to the misappropriation doctrine's preemption problem, and at the same time clarifies the doctrine's justification, by reexamining the morality of free-riding. As Part I demonstrates, courts have widely assumed that essentially all free-riding is morally objectionable. They have therefore thought that a misappropriation doctrine based on morality would have a sweeping breadth and so would clash with the policies embodied in federal copyright law. But no one has ever justified across-the-board moral disapproval of free-riding. As noted above, the ethics of free-riding has attracted little attention in legal circles. In philosophy, however, the situation is different. Many political philosophers have thought about the morality of free-riding, and they have generally found it to be impermissible far less often than the misappropriation case law presumes. Part II builds on insights from this philosophical literature to show that free-riding is unethical in a relatively narrow range of cases. As a result, turning misappropriation law back toward ethics would not yield a boundless doctrine in deep tension with copyright's aims.

In fact, misappropriation doctrine is *more* likely to avoid preemption when it is formulated in the right ethical terms than when it is formulated in terms of incentives. Part III advances the claim that, contrary to what courts have said, the misappropriation doctrine runs into insuperable preemption issues when it merely provides incentives for investment in copyrightable goods. By contrast, as Part IV shows, the misappropriation doctrine avoids preemption when it is rooted in a sounder understanding of the morality of free-riding. In short, ethics

19. See, e.g., *Confold Pacific, Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 960 (7th Cir. 2006); *Scranton Times, L.P. v. Wilkes-Barre Publ'g Co.*, No. 3:08-cv-2135, 2009 WL 585502 (M.D. Pa. Mar. 6, 2009); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1108–09 (C.D. Cal. 2007); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999). But see, e.g., *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 756 (D. Md. 2003) (criticizing the *NBA* test).

20. 650 F.3d 876, at 898–901 (2d Cir. 2011).

21. *Id.* at 894, 905–06.

22. See, e.g., Shyamkrishna Balganes, *The Uncertain Future of "Hot News" Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134, 135 (2012) (explaining that *Barclays* "did surprisingly little to clarify the scope, structure, or indeed analytical basis of [misappropriation] doctrine").

can tell us how to preserve misappropriation doctrine alongside copyright law and, more fundamentally, why such preservation is worthwhile to begin with.

I. THE MORAL CONVICTIONS BEHIND MISAPPROPRIATION DOCTRINE

Although the *NBA* opinion and some commentators deny that *INS* was grounded in fairness concerns,²³ the language of the opinion suggests otherwise. And certainly many ensuing misappropriation decisions were based expressly on moral views.²⁴ The *INS* Court's understanding of morality has been very important to the development of misappropriation doctrine, and it is worthwhile to examine the Court's thinking in depth.

The principal dispute in the *INS* case, at least by the time it reached the Supreme Court in 1918, was the International News Service's unauthorized copying of the Associated Press's news reporting.²⁵ The INS and the AP each represented members of the newspaper industry and were founded in order to facilitate the gathering and communication of news.²⁶ The news that each organization gathered, however, was meant for the exclusive benefit of that organization's paying members.²⁷ According to the AP's allegations, the INS had copied news from publicly accessible AP bulletins and sold it as the INS's own, without engaging in any independent investigation and with modest or no re-writing.²⁸ This, according to the AP, violated its "property" right in the valuable news it had gathered, and amounted to "piracy" and "unfair business competition."²⁹ The public interest factored into the AP's arguments in a secondary way: if one news organization simply copied from its rival, the public would "not get the benefit of news collected by two independent associations."³⁰

The Supreme Court agreed with the AP that the INS's copying was an un-

23. See, e.g., *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997); Gordon, *Gleaning*, *supra* note 13, at 2423 ("So, in *INS*, for all of its dicta about refraining from 'reap[ing] where [you] ha[ve] not sown,' the more applicable rule seems to be, you can't 'reap' if using the product of others' intelligence and effort is going to be so harmful to them as to make it impossible to get an important product to the public." (alterations in original) (footnotes omitted)).

24. There are even traces of the same views in cases that prefigured *INS*. See *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 250, 252 (1905); *Nat'l Tel. News Co. v. W. Union Tel. Co.*, 119 F. 294, 301 (7th Cir. 1902).

25. The AP had also complained that INS employees had bribed and induced AP members to break the terms of their membership agreements with the AP but by the time the case got to the Supreme Court, a string of clear victories on the bribery and inducement claims left only the bulletin-copying in dispute. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231–32 (1918).

26. *Id.* at 229.

27. *Id.* at 230.

28. *Id.* at 231.

29. *Id.* at 221, 223–24, 226.

30. *Id.* at 226.

fair act of piracy.³¹ By trying to benefit from the labor of its competitor, the INS was trying “to reap where it ha[d] not sown.”³² Worse still, given that this benefit enabled the INS to retain members or customers who otherwise might abandon it for the AP, the INS was in a sense benefiting at the AP’s expense and thus “appropriating to itself the harvest of those who [had] sown.”³³ For these reasons, the Court reasoned, a rival’s misappropriation of news at the time of its greatest commercial value was “unfair competition because [it was] contrary to good conscience.”³⁴ The Court did, however, stop short of recognizing a genuine property right in the news, which it said was “*publici juris*”—of public right.³⁵

Throughout its opinion, the Court’s condemned the INS’s free-riding on ethical grounds. It clearly believed the INS should not be permitted to copy from AP bulletins because depriving a business rival of value it had created through hard work was blatantly and inherently unfair.³⁶ The Court paid no real thought to the consequences of possible resolutions to the case for social welfare. It did not even endorse the AP’s concerns about the public’s interest in having multiple independent gatherers of news. Rather, the majority’s only mention of the practical consequences of a legal rule permitting copying was for the purpose of rebutting the INS’s suggestion that the AP’s publication of its news qualified as an abandonment of its property interests and impliedly authorized all others to use the published news freely.³⁷ The Court quite understandably found it unlikely that the AP would willingly agree to others’ free use of its news, which “would render publication profitless, or so little profitable as in effect to cut off the service.”³⁸ But aside from inferring that the AP did not intend to abandon its news for others’ use, the Court did not rest its decision on any observation along these lines. Thus *INS*’s clear concern was good ethics, not good incentives.³⁹

31. *See, e.g., id.* at 238, 239–40.

32. *Id.* at 239.

33. *Id.* at 239–40.

34. *Id.*

35. *Id.* at 234; *see also id.* at 235 (explaining that, outside of certain minor exceptions, “the news of current events may be regarded as common property”).

36. *See id.* at 240 (“The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.”); *cf. id.* at 245 (distinguishing the AP’s admitted use of rivals’ news for “tips” from the INS’s copying without further investigation on the grounds that the former manifested no “unconscientious or inequitable attitude towards its adversary”).

37. The Court also made a general observation that the INS and the AP were engaged in the news business in order to make a profit. *Id.* at 235 (describing parties’ business as selling newspapers “at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world.”).

38. *Id.* at 241.

39. The same is true of *Gilmore v. Sammons*, 269 S.W. 861 (Tex. Civ. App. 1925), an early Texas case prohibiting misappropriation of news about construction work opportuni-

In the century since *INS*, the AP has successfully wielded the decision to protect its news in other factual settings. Starting in the early 1930s, the AP scored a few misappropriation victories against radio stations that were reading AP news stories over the airwaves.⁴⁰ In the most prominent of these cases, the Ninth Circuit gave voice to the *INS* majority's moral concerns in new circumstances, finding that the radio station's actions amounted to "piracy" and "purloining of [the AP's] fresh news" and hence "unfair competition."⁴¹ Here too the court focused more on what it called "the question of good conscience in an equity tribunal" than on the consequences for society as a whole, although it did discuss the public function of the press more than the Supreme Court had in *INS*.⁴²

More recently, the AP's lawyers have pursued misappropriation claims against websites that aggregate AP content along with other news.⁴³ Its main courtroom victory to date has been in an action against All Headline News, a company that collected news reports it found online and then sold them to other websites with occasional rewriting.⁴⁴ Since the *All Headline News* decision predates *Barclays* and relies on *NBA*, it is not certain that it remains a strong precedent for the AP going forward.⁴⁵ Regardless of the ultimate effect of *Bar-*

ties. There, the court said that the defendant's conduct "constituted an unfair and illegal interference with [the plaintiff's] business, and could have but one effect: that is, to deprive [the plaintiff] of a portion of his fairly earned profits and to divert the same to the coffers of [the defendant]." *Id.* at 863. The court did not discuss possible effects on social welfare at all.

40. *E.g.*, *Associated Press v. KVOS, Inc.*, 80 F.2d 575 (9th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U.S. 269 (1936); *Veatch v. Wagner*, 109 F. Supp. 537 (D. Alaska 1953); *see also* *Associated Press v. KVOS, Inc.*, 9 F. Supp. 279, 285, 287 (W.D. Wash. 1934) (describing an unreported case from 1933 in which a South Dakota federal district judge, relying on *INS*, enforced the AP's "property right" in its news against radio broadcasters).

41. *KVOS, Inc.*, 80 F.2d at 582.

42. *Id.* at 581; *see also* *Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co.*, 411 Pa. 383, 393-94 (1963) (interpreting copyright as principally concerned with encouraging creativity and misappropriation law as principally concerned with prohibiting wrongful "usurpation of a competitor's investment and toil").

43. *See, e.g.*, Complaint, *Associated Press v. Moreover Techs., Inc.*, No. 07 Civ. 8699 (S.D.N.Y. Oct. 9, 2007); *see also* *AP Settles Lawsuit Against Moreover and VeriSign*, AP.ORG (Aug. 8, 2008), <http://www.ap.org/Content/AP-in-the-News/Archive/AP-settles-lawsuit-against-Moreover-and-VeriSign>. In addition, Google voluntarily agreed to pay for a license to aggregate AP content. *See, e.g.*, Sarah Ellison & Christopher Lawton, *Google to License Content from AP for New Service*, WALL ST. J. (Aug. 4, 2006), <http://online.wsj.com/article/SB115464732326426336.html>. Besides pursuing misappropriation claims, the AP has also successfully invoked the misappropriation doctrine to support its demands that news aggregators take down excerpts from its stories. *See* Rogers Cadenhead, *AP Files 7 DMCA Takedowns Against Drudge Retort*, WORKBENCH (June 12, 2008, 3:26 PM), <http://workbench.cadenhead.org/news/3368/ap-files-7-dmca-takedowns-against-drudge>.

44. *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009).

45. *Id.* at 461. *But cf.* *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d

clays, however, the AP continues to see misappropriation claims as a useful weapon against news aggregators.⁴⁶

Over the last century, the misappropriation doctrine has spread well beyond the news, too. That is hardly surprising given the *INS* opinion's sweeping condemnation of free-riding: in the Court's view, essentially everyone who freely benefits from a competitor's efforts, at the competitor's expense, has gained an unfair competitive advantage.⁴⁷ Obviously newsgathering is not the only industry where one can reap what one's competitors have sown.

It is no surprise, then, that courts have long applied *INS* beyond the context of news. Even those who resisted the growth of misappropriation doctrine had to admit that the Court's reasoning could not easily be confined on its own terms. As Douglas Baird has documented, Judge Learned Hand opposed *INS* on policy grounds and sought repeatedly to limit its holding to its facts, but privately he acknowledged that the principles adopted in *INS* carried over into other contexts.⁴⁸ In correspondence with fellow judges on the panel in *Cheney Bros. v. Doris Silk Corp.*⁴⁹—a case brought by a designer and manufacturer of silk fabrics—Judge Hand acknowledged “that on principle [*INS*] is hard to distinguish.”⁵⁰ The *Cheney Bros.* opinion makes practically the same confession, although it proceeds to distinguish *INS* anyway.⁵¹ Likewise with Judge Charles E. Clark's opinion in *RCA Manufacturing Co. v. Whiteman*, which also included Judge Hand on the panel.⁵² That case addressed a record company's efforts to prevent unauthorized radio broadcast of its records. Like Judge Hand years before, Judge Clark privately observed that *INS* applied perfectly well: “In principle, this case is entirely indistinguishable from [*INS*], and we might as well admit it. But we have conquered the *News* case before; it can be done again.”⁵³ And so the *RCA Manufacturing* court, following *Cheney Bros.*, de-

876, 906 (2d Cir. 2011) (hinting that the *All Headline News* case's refusal to dismiss the AP's misappropriation claim might have been correct because its facts were sufficiently close to the facts involved in *INS v. AP*).

46. Complaint at 2, *Associated Press v. Meltwater U.S. Holdings, Inc.*, (S.D.N.Y. 2012) (No. 12 Civ. 1087).

47. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239–40 (1918).

48. Baird, *supra* note 4, at 33–34.

49. 35 F.2d 279 (2d Cir. 1929).

50. Baird, *supra* note 4, at 33 (quoting Memorandum from Learned Hand to Martin T. Manton & Thomas W. Swann (Oct. 8, 1929) (Learned Hand Papers, Harvard Law School Library)).

51. *Cheney Bros.*, 35 F.2d at 280 (“Although [*INS*] concerned another subject-matter—printed news dispatches—we agree that, if it meant to lay down a general doctrine, it would cover this case; at least, the language of the majority opinion goes so far. We do not believe that it did.”)

52. 114 F.2d 86 (2d Cir. 1940).

53. Baird, *supra* note 4, at 34 (quoting Memorandum from Charles E. Clark to Learned Hand & Robert P. Patterson (June 21, 1940) (Learned Hand Papers, Harvard Law School Library)).

nied the misappropriation claim by limiting *INS* to its facts.⁵⁴

Although *RCA Manufacturing* declined to expand *INS* to cover music recordings—which received no federal copyright protection of any sort until 1972⁵⁵—almost all other decisions on the issue came out the opposite way. Indeed, this was one of the areas where misappropriation doctrine flourished. As the *RCA Manufacturing* court itself noted, the Pennsylvania Supreme Court had just ruled in a record maker’s favor in a factually indistinguishable case.⁵⁶ Sometimes the facts varied slightly. In the 1950 New York case, *Metropolitan Opera Ass’n v. Wagner-Nichols Recorder Corp.*,⁵⁷ the defendant was recording the Met’s radio broadcasts and then selling the records to the public. The court interpreted misappropriation doctrine as providing an essentially unconstrained cause of action against immoral marketplace actors:

[The doctrine] originated in the conscience, justice and equity of common-law judges. It developed within the framework of a society dedicated to freest competition, to deal with business malpractices offensive to the ethics of that society. The theoretic basis is obscure, but the birth and growth of this branch of law is clear. It is an outstanding example of the law’s capacity for growth in response to the ethical as well as the economic needs of society. As a result of this background the legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions.⁵⁸

Although the court also thought that the defendant’s actions were “repugnant to the public interest,” its focus was on the perceived wrong that those actions did to the plaintiff.⁵⁹ Expanding upon the *INS* court’s agrarian imagery, the court concluded by mustering its equitable powers to enjoin “a business venture pur-

54. *RCA Mfg. Co.*, 114 F.2d at 90 (“[*INS*] really held no more than that a western newspaper might not take advantage of the fact that it was published some hours later than papers in the east, to copy the news which the plaintiff had collected at its own expense. In spite of some general language it must be confined to that situation.” (citing *Cheney Bros.*, 35 F.2d at 281)).

55. See Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391, repealed by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.); cf. 17 U.S.C. § 301(c) (2006) (explaining that pre-1972 sound recordings still receive no federal copyright protection).

56. *Waring v. WDAS Broad. Station, Inc.*, 194 A. 631 (Pa. 1937).

57. 199 Misc. 786, 790 (N.Y. Sup. Ct. 1950), *aff’d per curiam*, 279 A.D. 632 (N.Y. App. Div. 1951).

58. *Id.* at 792; see also *id.* at 796 (“The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrong-doer.”).

59. *Id.* at 802 (explaining that, in order to avoid a “travesty of justice,” “[e]quity will consider the interests of all parties coming within the arena of the dispute and admeasure the conflict in the scales of conscience and on the premise of honest commercial intercourse.”); see also *id.* at 805 (chastising defendants for “their unconscionable business practices and their invasion of the moral standards of the market place”).

posed to gather in the harvest the seeds of which were planted and nurtured by others at great expense and with consummate skill.”⁶⁰

The *Met Opera* case is often singled out for its zealous language, but neither its holding nor even its rhetoric was unique. Many music recordings cases struck a similar chord. Take for example, a decision by the South Carolina Supreme Court, which enjoined “parasitic acts” by record copyists who had been “reaping where they [had] not sown.”⁶¹ This court was following a neighbor in North Carolina, which approached record copying by simply asking, “Has the plaintiff’s legitimate business been damaged through acts of the defendants which a court of equity would consider unfair?”⁶² Or consider the Wisconsin Supreme Court’s professed understanding of *INS*-style unfair competition in the same setting: “The legal principles which are controlling here are simply the principles of old-fashioned honesty. One man may not reap where another has sown nor gather where another has strewn.”⁶³ In these cases and many others,⁶⁴ courts ruled against record copyists, who again had infringed no one’s copyright, simply to protect the original creator from what was believed to be a moral injury. The Second Circuit’s *RCA Manufacturing* decision was the outlier in this area; most record copying cases were decided on the same moral grounds as *INS*.⁶⁵

And musical recordings are far from the only sort of non-news work covered by the misappropriation doctrine. Even the fashion industry, which Judge Hand had tried to keep out of *INS*’s reach in *Cheney Bros.*,⁶⁶ and which still receives no direct copyright protection,⁶⁷ embraced misappropriation. The

60. *Id.* at 805.

61. *Columbia Broad. Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 478 (1972).

62. *Liberty/UA, Inc. v. E. Tape Corp.*, 180 S.E.2d 414, 415 (N.C. Ct. App. 1971) (citations omitted).

63. *Mercury Record Prods., Inc. v. Econ. Consultants, Inc.*, 64 Wis. 2d 163, 176 (1974) (quoting *J. I. Case Plow Works v. J. I. Case Threshing Mach. Co.*, 162 Wis. 185, 201 (1916) (internal quotation marks omitted)).

64. *See generally, e.g.*, *Capitol Records v. Erickson*, 82 Cal. Rptr. 798 (App. 2d Dist. 1969); *Capitol Records v. Spies*, 130 Ill. App. 2d 430 (App. Ct. 1st Dist. 1970); *GAI Audio of N.Y., Inc. v. Columbia Broad. Sys., Inc.*, 340 A.2d 736 (Md. Ct. Spec. App. 1975); *Nat’l Broad. Co. v. Nance*, 506 S.W.2d 483 (Mo. Ct. App. 1974); *Columbia Broad. Sys., Inc. v. Melody Recordings*, 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975); *Capitol Records v. Greatest Records*, 43 Misc. 2d 878 (N.Y. Sup. Ct. 1964).

65. *Cf. Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 663 (2d Cir. 1955) (observing that *RCA Manufacturing Co.* did not accurately reflect the law of New York).

66. *See also Fashion Originators Guild of Am. v. Fed. Trade Comm’n*, 114 F.2d 80, 84 (2d Cir. 1940) (L. Hand, J.) (“It may be unfortunate—it may indeed be unjust—that the law should not thereafter distinguish between ‘originals’ and copies; but until the copyright law is changed, or until the Copyright Office can be induced to register such designs as copyrightable under the existing statute, they both fall into the public demesne without reserve.” (citing *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929))), *aff’d*, 312 U.S. 457 (1941).

67. Some commentators, however, have advocated creating *sui generis* protection for fashion designs. *See, e.g.*, C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Econom-*

judge who decided *Met Opera* used the same *INS*-influenced reasoning and rhetoric to enjoin copyists from selling sketches of a famous designer's newest creations to other clothing makers.⁶⁸ Likewise, even though preemption doomed the plaintiff in the *NBA* case, which concerned unauthorized transmission of professional basketball game scores,⁶⁹ sporting event organizers have regularly had success against those who disseminate unauthorized photos or accounts of their events.⁷⁰ Yet another case forbade use of the plaintiff's Mutt and Jeff cartoon characters in the defendant's comic strips.⁷¹ And in Texas, not only can you make a decent living recording wild animal sounds, you can also rest assured of the misappropriation doctrine's protection.⁷²

Recently, a major source of misappropriation litigation has come from the unauthorized use of financial market indices, such as the Dow Jones Industrial Average. These indices measure the performance of a market and are often used to create financial products that help investors to diversify their holdings. It is not clear whether these indices can be copyrighted, since they are arguably purely factual in nature, rather than the products of creative decision making. But while courts have split over the copyrightability of financial market indices, they have agreed that one who makes unauthorized use of an established financial market index to create investment products may be liable for misappropriation.⁷³

In short, misappropriation doctrine has expanded much since *INS*—thanks in large part to the generality of early cases' moral disapproval of free-riding. And the doctrine maintains a healthy presence today alongside the core areas of intellectual property law. Many misappropriation cases concern the use of ma-

ics of Fashion, 61 STAN. L. REV. 1147, 1184–95 (2009).

68. *Dior v. Milton*, 9 Misc. 2d 425, 443 (N.Y. Sup. Ct. 1956) (“The defendants have embarked upon a hazardous enterprise which equity will not hesitate to strike down. Cast in its proper environment, we have here a business venture proposed to gather in the harvest, the seeds of which were planted and nurtured by others at great expense and with consummate skill.”), *aff'd without opinion*, 2 A.D.2d 878 (N.Y. App. Div. 1956).

69. *See Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 843–44 (2d Cir. 1997).

70. *See, e.g., Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (Major League Baseball broadcasts); *Madison Square Garden Corp. v. Universal Pictures, Co.*, 255 A.D. 459 (N.Y. App. Div. 1938) (boxing match photographs); *Mut. Broad. Sys., Inc. v. Muzak Corp.*, 177 Misc. 489 (N.Y. Sup. Ct. 1941) (World Series broadcasts).

71. *Fisher v. Star Co.*, 231 N.Y. 414, 433 (1921) (“The only purpose that another than respondent can have in using the figures or names of ‘Mutt’ and ‘Jeff’ is to appropriate the financial value that such figures and names have acquired by reason of the skill of the respondent.”).

72. *See U.S. Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214 (Tex. App. 1993).

73. *Compare Chi. Bd. Options Exch. v. Int'l Sec. Exch., L.L.C.*, 2012 IL App. 102228, ¶¶ 25, 55 (holding that plaintiffs' stock market indices fell outside the scope of copyright law but were unlawfully misappropriated by defendants who used them to create index options), *with BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 606–09, 614 (S.D.N.Y. 2010) (refusing to dismiss either plaintiff's misappropriation claim or its copyright claim).

terial that, like the news or fashion designs, is not copyrightable for one reason or another. Other times misappropriation claims supplement colorable copyright claims,⁷⁴ or even give trademark claims a boost.⁷⁵ As noted in the Introduction, courts have shied away from explicitly relying on a moral critique of free-riding because that critique is widely thought to lead to misappropriation's preemption by copyright law.⁷⁶ Yet although misappropriation and morality are now officially divorced, some judges still may be moved by the kind of moral disapproval that was so influential earlier in the doctrine's history.⁷⁷ Given the current uncertainty over the doctrine's ongoing viability and its potential for further development,⁷⁸ it is worth examining the doctrine's moral basis more carefully.

II. FREE-RIDING AND MORAL PERMISSIBILITY

Despite its historical and continuing importance, the moral argument against misappropriation has been underdeveloped. Perhaps many think the argument is straightforward enough. Whenever legal scholars do discuss the ethical dimensions of *INS*, they typically cite John Locke and move on. This Part argues that Locke's discussion of natural property rights provides no obvious support for critics of free-riding and then turns to more developed literature in political philosophy to make the case that free-riding is actually unfair only in limited circumstances.

74. *See, e.g.*, *Roy Export Co. v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1098–99 & n.6, 1106–07 (2d Cir. 1982) (upholding award of \$410,000 in compensatory and punitive damages for misappropriation claim based on defendants use of plaintiffs' film clip montage in addition to award of \$312,281 in compensatory, punitive, and statutory damages for copyright infringement of montage and underlying film clips); *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457, 461–62 (S.D.N.Y. 2009) (noting that defendant had not moved to dismiss the AP's copyright infringement claim and refusing to dismiss the AP's Digital Millennium Copyright Act claim).

75. *See, e.g.*, *ITC Ltd. v. Punchgini, Inc.*, 880 N.E.2d 852 (N.Y. 2007) (explaining that New York misappropriation law allows trademark owners to prevent unfair competition in the form of unauthorized use of their goodwill).

76. *See supra* text accompanying notes 14–22.

77. One can occasionally catch a whiff of such disapproval even in very recent decisions. *See, e.g.*, *Chi. Bd. Options Exch.*, 2012 IL App. 102228, ¶ 53 (“We share the circuit court’s puzzlement at ‘how [defendant’s] failure somehow entitles it to profit for free from the efforts, skills, and reputation of the [plaintiff] Index Providers.’”).

78. Some have argued that common law doctrines like misappropriation are perennially popular among intellectual property plaintiffs, partly because they afford a possible source of relief when statutory law is slow to catch up with novel forms of copying. *See, e.g.*, Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 428 (1997).

A. *Locke's Limits*

It is controversial to claim that Locke's rather complex arguments justify intellectual property ownership no less than tangible property ownership.⁷⁹ Of course, if Locke's labor theory does justify intellectual property ownership, free-riding on someone's intellectual labor might indeed violate their rights.⁸⁰ But discussions of the ethics of *INS* typically do not develop the claim that misappropriation violates a Lockean natural right of intellectual property ownership. Rather, they ground the *INS* majority's position in a much more general (purportedly) Lockean principle "that there [is] something inherently wrong with reaping where another ha[s] sown"⁸¹ or "that individuals and entities ought to be rewarded with exclusive rights to the economic returns generated by their own enterprise and effort."⁸² In other words, commentators often read Locke as committed to the same sweeping disapprobation of free-riding as the *INS* majority.⁸³

But Locke really cannot be read as asserting that freely benefiting from the labors of others is necessarily immoral. Although he would surely condemn the person who steals the crops that another individual has planted for his or her own nourishment—literally taking another's fruits—Locke seems to find nothing objectionable in reaping what another has sown when doing so does not interfere with the latter's use and enjoyment of what he or she has grown.⁸⁴ Rather, he says that laboring on natural resources gives an individual "*no Right, farther than his Use* call[s] for any of them, and they might serve to afford him Conveniences of Life."⁸⁵ In fact, Locke expressly provides his own example of

79. Compare, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 48–66 (2011) (describing intellectual property's general success in satisfying Locke's conditions for private ownership), and Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 300 (1988) (same), with Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 51 (1989) (describing intellectual property's failure to satisfy Locke's conditions for private ownership), and Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 156–57 (Stephen R. Munzer ed., 2001) (same).

80. Elsewhere, however, I argue that Locke's labor theory does *not* justify intellectual property ownership in the way it justifies tangible property ownership. Michael E. Kenneally, *Intellectual Property Rights and Institutions: A Pluralist Account* 16–72 (May 5, 2014) (unpublished Ph.D. dissertation, Harvard University), available at <http://ssrn.com/abstract=2310986>.

81. STUART BANNER, *AMERICAN PROPERTY* 89 (2011).

82. Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 722 (1992).

83. But see Gordon, *Restitutionary Impulse*, *supra* note 13, at 167 ("Unlike most observers, I do not trace the restitutionary claim primarily to natural law or Lockean labor theory.")

84. On this point, see A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 277 (1992) and Thomas Scanlon, *Nozick on Rights, Liberty, and Property*, 6 PHIL. & PUB. AFF. 3, 21–23 (1976) (book review).

85. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, § 37, at 295 (Peter Laslett

a situation in which reaping what another person has sown would be permissible:

Whatsoever [the laborer] tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar Right; whatsoever he enclosed, and could feed, and make use of, the Cattle and Product was also his. But if either the Grass of his Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering, and laying up, *this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.*⁸⁶

Here Locke claims that if a laborer has cultivated land in the state of nature by enclosing it and planting on it, but his crops are going to waste, another person may claim the land to make good use of it, regardless of the first person's improvements. Locke does not take the very broad view that reaping where another has sown is *ipso facto* impermissible.

Perhaps so many commentators interpret Locke otherwise because of his emphasis on labor's tendency to increase the value of natural resources considerably.⁸⁷ According to Locke's theory of value, "*labour makes the far greatest part of the value of things, we enjoy in this World.*"⁸⁸ He estimates that ninety or even ninety-nine percent of the value of things useful to human beings is attributable to labor.⁸⁹ And it might seem natural to think (and to think that Locke himself thinks) that when some resource's value is due to a particular person's efforts, that person ought to capture the value for which her efforts are responsible.⁹⁰ But closer attention to this part of Locke's discussion supports a contrary interpretation. His point in these passages is only that, once developed through labor, land is vastly more productive and therefore contributes disproportionately more to the survival and comfort of humanity.⁹¹ This claim that labor makes land far more valuable than it would otherwise be is important to Locke because it helps him contend that acquiring land by laboring on it does not make everyone else worse off.⁹² If the acquirer is increasing the land's

ed., Cambridge Univ. Press 1988) (1689).

86. *Id.* bk. II, § 38, at 295 (emphasis added).

87. See Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL'Y 283, 293 (2012) (explaining how it is "widely accepted that the ubiquitous references within Anglo-American property law to 'securing the fruits of one's labors' [are] an explicit invocation of Lockean property theory, particularly to the labor theory of value that functions as a central premise within Locke's justification for property rights").

88. LOCKE, *supra* note 85, bk. II, § 42, at 297.

89. See *id.* bk. II, § 40, at 296.

90. See, e.g., LAWRENCE C. BECKER, PROPERTY RIGHTS 35 (1977) (understanding Locke to be arguing that "one is entitled to the whole of the value one's labor adds to things, and . . . the other expected benefits as well").

91. See, e.g., LOCKE, *supra* note 85, bk. II, § 37, at 294.

92. See *id.* bk. II, § 33, at 291 ("Nor was this *appropriation* of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left."); *id.* bk. II, § 37, at 294 ("This is certain, that in the beginning, before the desire of hav-

productivity, a limited amount goes a very long way—at least until human beings start to accumulate vast stores of imperishable wealth through the adoption of money.⁹³ And so Locke claims that one laborer’s appropriation of some piece of land actually benefits the rest of humanity because the laborer can make do acquiring much less land than he would need to exploit in an undeveloped commons: “he, that incloses Land and has a greater plenty of the conveniencys of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind.”⁹⁴

In fact, if Locke had thought that laborers deserved compensation for *all* the value that their work created, he would have had to maintain that the enterprising person who labors productively in the state of nature for his own benefit would be entitled to further reward, proportionate to the benefit everyone else receives from the relative increase in available natural resources. Locke never suggests the land-appropriating laborer deserves compensation for the ninety undeveloped acres he makes available to others.⁹⁵ Once again, then, it is hard to see how his position could possibly be that freely benefiting from another’s labors is morally suspect.

The only indication that Locke thought free-riding morally suspect is his remark that “the benefit of another’s Pains” is something a non-laborer has “no right to.”⁹⁶ But even this statement is not really a condemnation. To say that a person has *no right* to something does not necessarily imply that the person acts wrongly if she obtains the thing anyway. Strictly speaking, saying a person has no right to something is only to say that no one is obligated to provide it to him or to let him have it, and hence that the person cannot claim his rights have

ing more than man needed had altered the intrinsic value of things, which depends only on their usefulness to the life of man; or had agreed, that a little piece of yellow metal, which would keep without wasting or decay, should be worth a great piece of flesh, or a whole heap of corn; though men had a right to appropriate, by their labour, each one to himself, as much of the things of nature, as he could use: yet this could not be much, nor to the prejudice of others, where the same plenty was still left to those who would use the same industry.”); *cf. id.* bk. II, § 27, at 288 (indicating that his argument for natural property rights proceeds only under the assumption that the laborer leaves “enough, and as good . . . in common for others”).

93. *Id.* bk. II, § 36, at 293 (“This I dare boldly affirm, That the same *Rule of Propriety*, (*viz.*) that every Man should have as much as he could make use of, would hold still in the World, without straitning any body, since there is Land enough in the World to suffice double the Inhabitants had not the *Invention of Money*, and the tacit Agreement of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to them.”); *see also id.* bk. II, § 48, at 301.

94. *Id.* bk. II, § 37, at 294.

95. Locke does say that in Spain the productivity of the person who develops formerly unused land is so great that other “Inhabitants think themselves beholden to him.” *Id.* bk. II, § 36, at 293. But he does not say the Spaniards are right to think this or that they actually are obligated to compensate the productive laborer.

96. *Id.* bk. II, § 34, at 291.

been violated just because others prevented him from having it.⁹⁷ And the surrounding context indicates that this was Locke's meaning, for he claims no one has a right to the benefit of another's pains simply to support his conclusion that the rest of humanity has no basis to "complain" when the laborer acquires a natural resource from the commons for his or her exclusive use.⁹⁸

In two places—his implicit denial that the land-cultivator deserves extra reward for having increased the productivity of the earth's resources and his explicit endorsement of mitigating another's wastefulness—Locke implicitly rejects a broad condemnation of free-riding. So to understand the morality of free-riding, one must provide more than a token citation to Locke's labor theory. And really this is not surprising, for free-riding as such was not Locke's concern. Perhaps his arguments can yet be developed to guide courts in intellectual property free-riding disputes, but such a project will require no small amount of work.

B. *Contemporary Insights*

Unlike Locke, contemporary political philosophers have reflected on the ethics of free-riding at length. It all started with H.L.A. Hart's innovative argument that individuals are morally obligated to obey the law because free-riding is unfair. Hart claimed, in essence, that when a group of people restrict their activities according to a set of rules, including legal rules, any person who benefits from their compliance with those rules owes it to them to comply with the same rules, regardless of whether he or she consented to the rules.⁹⁹ John Rawls then endorsed this argument and developed it further: if "a mutually beneficial and just scheme of social cooperation" imposes some costs on its intended beneficiaries, some of whom are tempted to obtain the benefits without bearing the costs, the "person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating."¹⁰⁰ But this Hart/Rawls "principle of fairness" (or

97. On Wesley Hohfeld's famous account of jural relations, for example, *A* has no right (or, *A* has a "no-right") against *B* that *B* perform some action *X* if and only if *B* has a privilege, as far as *A* is concerned, not to perform *X* (or, if and only if *B* has no duty to *A* to perform *X*). See, e.g., WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 38–39 (Walter Wheeler Cook ed., 1919).

98. LOCKE, *supra* note 85, bk. II, § 34, at 291 ("He that had as good left for his Improvement, as was already taken up, needed not complain . . . If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to . . .").

99. H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185–86 (1955).

100. John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 10 (Sidney Hook ed., 1964); see also John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164, 179–80 (1958). But later, in *A Theory of Justice*, Rawls argued that political obligation's primary source was not the principle of fairness but a "natural duty" of justice—a duty, that is, that every person has to support and comply with just institutions that apply to him or her and to take reasonable measures in furtherance of just arrangements not yet in existence. See

“fair play”)¹⁰¹ was forcefully challenged by Robert Nozick in his book *Anarchy, State, and Utopia*, and philosophers have been debating the permissibility of free-riding ever since.

Nozick’s challenge came by way of counterexample. Imagine a neighborhood that happens to have a public address system the residents wish to use to broadcast material that might benefit the community.¹⁰² They devise a plan whereby everyone shares broadcasting responsibilities equally. On one day per year, each of the neighborhood’s 365 residents must sign up to broadcast music, stories, jokes, news, or anything else of his or her choosing for the edification of those who want to listen. All but one of the neighborhood residents willingly go along with this plan and take their turn in the broadcast booth. But a single resident chooses not to, even though he previously chose to take in some of his neighbors’ enjoyable broadcasts. Nozick wonders whether this free-rider has violated any moral obligation, and concludes he has not.¹⁰³ If Nozick’s view about this example is right, the Hart/Rawls principle of fairness is not, at least not in its original formulation.¹⁰⁴ For if the individual who free-rides on the public address system acts permissibly, not every mutually beneficial cooperative scheme generates positive obligations for those who accept benefits made possible by others’ rule-following.

Nozick proceeded too quickly from this counterexample to his ultimate conclusion that the principle of fairness cannot be fixed to ground an enforceable, nonconsensual duty to obey the law.¹⁰⁵ And so a number of philosophers have disputed Nozick’s bold claims about political obligation, but they have mostly accepted his position that the free-riding in the public address system example is morally permissible. They have instead resisted Nozick by working to formulate new versions of an anti-free-riding principle that would avoid condemning free-riding in the public address system example.¹⁰⁶ To do so, however, they have needed not only to work around one particular example, they have had to address Nozick’s deeper problem with critics of free-riding. After advancing the public address system hypothetical and several others,

JOHN RAWLS, A THEORY OF JUSTICE 97–100, 301–03, 310 n.13 (rev. ed. 1999).

101. The two philosophers’ versions of the principle of fairness are not identical, but for the purposes of this Article, the differences do not matter.

102. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 93 (1974).

103. *Id.* at 95.

104. Rawls’s formulation might survive unscathed, however, if the Nozickian broadcasting scheme does not qualify as “just” because it asks too much of those it obligates given the benefits it supplies in return. I am grateful to T.M. Scanlon for suggesting this possibility.

105. See NOZICK, *supra* note 102, at 95.

106. See, e.g., Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616, 617–23 (1982); Garrett Cullity, *Moral Free Riding*, 24 PHIL. & PUB. AFF. 3, 8–22 (1995); George Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 PHIL. & PUB. AFF. 241, 245–53 (1987); Scanlon, *supra* note 84, at 15–17; A. John Simmons, *The Principle of Fair Play*, 8 PHIL. & PUB. AFF. 307, 319–33 (1979).

Nozick said:

You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on. You have, if anything, even less reason to demand payment if your activity that gives me the book also benefits you; suppose that your best way of getting exercise is by throwing books into people's houses, or that some other activity of yours thrusts books into people's houses as an unavoidable side effect. Nor are things changed if your inability to collect money or payments for the books which unavoidably spill over into others' houses makes it inadvisable or too expensive for you to carry on this activity with this side effect. One cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this.¹⁰⁷

Nozick's approach is thus to adopt the perspective of the one who is considering whether to perform the action that will create the benefits for others. Nozick asks what gives that person, at that time, a right to insist later on that those others pay for the benefits they have received. In other words, when a benefit-provider chooses freely to engage in an activity, why should she count on the support of those who stand to benefit? With this approach, understanding the morality of free-riding requires figuring out when benefit-providers would have a justified expectation that their beneficiaries will compensate them.

C. *An Expectations-Focused Approach to the Morality of Free-Riding*

Of course there are a few easy cases in which the benefit-provider's reliance on others' contribution would be readily justified and the benefit-recipient indeed would have a duty to contribute. Consider promises. If the benefit-recipient has assured the benefit-provider that he would pay for the benefits received, the benefit-provider is justified in relying on the promise. And no doubt a benefit-recipient can justify the benefit-provider's expectations of contribution through other sorts of voluntary acts besides making a promise. One such example, perhaps relevant in the misappropriation context,¹⁰⁸ would be the

107. NOZICK, *supra* note 102, at 95.

108. Richard Epstein and Henry Smith have argued that the INS's free-riding was objectionable at least in part because it violated the news industry's own customs (although they are more interested in the custom's possible positive effects on social welfare rather than in whether violating the custom was morally impermissible). See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 94–102, 106 (1992); Henry E. Smith, *Equitable Intellectual Property: What's Wrong with Misappropriation?*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 42, 54–55, 57–58 (Shyamkrishna Balganesh ed., 2013); see also Shyamkrishna Balganesh, "Hot News": *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 444 (2011) (claiming that the news industry as a whole observed norms against free-riding). It would indeed have been opportunistic and wrongful for the INS to encourage customary norms that benefited it only to ignore them when doing so served its interests. Nonetheless, other misappropriation cases cannot be explained on the basis of custom, nor did the

benefit-recipient who has previously fostered norms against free-riding and insisted that others comply. Such a person's subsequent violation of the same anti-free-riding norms would indeed be unfair.

But in the hard cases—and likely the most crucial cases for the misappropriation doctrine—the benefit-recipient has done nothing in advance to directly encourage expectations of compensation. The question in these cases is whether the benefit-provider can count on compensation simply on the ground that she provided a benefit that someone else willingly accepted.¹⁰⁹

Here is one reason for thinking, with Nozick, that the answer is no: a free-rider's choice to accept a benefit may depend on the fact that the benefit was available for free (or at discount) because of the other party's actions. Put another way, the free-rider could well have justified expectations of his or her own, and these justified expectations could be what prompts her choice to free-ride. One cannot simply assume such expectations are *unjustified*, of course, because that would beg the question against the free-rider by assuming in advance that free-riding is morally objectionable. To the extent a free-rider can truthfully say that he accepted the benefit only because (he thought) it was available for free, the person who makes the benefit available to him might not be justified in counting on his payment.

And it seems such situations are likely to arise quite often in free-riding disputes. Imagine a person looking for something to do. She might find entertainment at a movie theater, make progress on a work project, learn something new, purchase any number of useful objects, and so on. She could perceive good reasons to act in each of those ways, and likely would be acting perfectly reasonably if she chose any one of them. Such situations arise all the time,¹¹⁰ and part of her having real freedom to make her own choices derives from that fact.¹¹¹ Now imagine she makes a choice in large part because other people's

INS opinion rely on customary norms to decide that the *INS*'s free-riding was fundamentally unfair. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 242–45 (1918) (discussing news-industry norms for the purpose of evaluating *INS*'s unclean hands defense). It is not even certain that the alleged news-industry norms against free-riding were settled and universally recognized or that the *INS* itself encouraged them. In fact, the only evidence of those norms in the *INS* case was the self-serving insistence of the AP. See Epstein, *supra*, at 97–98 (using the AP's brief to identify the relevant custom); cf. Baird, *supra* note 4, at 24–25 (explaining how the particular customary norm that the AP invoked worked “greatly” in its own favor). In the end, then, perhaps the *INS* should not be faulted for violating norms that it had previously fostered. Cf. Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1974 (2007) (observing that judicial reliance on customs is most difficult to justify when the customs are being wielded “against those who did not participate in their development”).

109. For emphasis on the willing acceptance aspect of the question, see Simmons, *supra* note 106, at 324–27, 334.

110. See JOSEPH RAZ, *Incommensurability and Agency*, reprinted in *ENGAGING REASON* 46, 65 (1999) (“In typical situations, reason does not determine what is to be done. Rather it sets a range of eligible options before agents, who choose among them . . .”).

111. See John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 10

acts have made one option look especially attractive here and now. She always stands to benefit, for instance, from a good game of Frisbee golf, or “frolf.” Of course that does not mean she seeks out a game every single time she finds herself with nothing to do. Yet if she happens to be in the park when a friendly group invites her to join their Frisbee golf game, she may well choose to stay and play on account of their invitation.¹¹²

In such a case, would she incur a duty to compensate her fellow frolfers at the end of their game? That seems an awfully extreme position. It would be odd if the players tallied up the total benefits each derived from the game and felt they had to offset the benefits each made available to the others so all could settle their accounts. It would also be odd if the last-minute invitee were expected to provide payment for the benefit she received because, in the end, her presence proved not to increase the other players’ enjoyment of their game on net. It is simply too routine an occurrence—one person influencing someone else’s actions by presenting new opportunities to benefit—for humanity to insist that all benefits received ought to be paid back to whoever made them possible. If failing to provide such compensation were always an impermissible kind of free-riding, we would constantly be racking up (and canceling out) debts to one another. Mercifully, no one proposes free-riding scruples so extreme. Nor do normal people invariably demand (or offer) compensation for the benefits they provide (or accept from) others. In some cases, then, it seems perfectly fine to accept benefits that others have made possible without paying them back.

Of course, even though some free-riding decisions seem backed by a justified expectation that the benefit can be accepted for free, that does not mean all are. Suppose the free-rider would have sought out the benefit in question even if he had to do so at personal expense, simply because that particular benefit was that important to him. In such cases the free-rider could not say, in his defense, that he accepted the benefit solely because he thought it was available for free. And so the benefit-provider would have a justified expectation of payment in that sort of case—not because of the free-rider’s mere acceptance of the benefit, but because of his preexisting and decisive reasons to bear costs to obtain it.¹¹³ Given the characteristics of the benefit and of the free-rider, it would have been unreasonable for him not to seek out the benefit at some personal cost. Therefore, the benefit-provider is not requesting any payment the free-rider could reasonably have avoided had the free-riding opportunity not arisen.

Focusing on both parties’ justified expectations in free-riding disputes sug-

(1990) (“[O]ne has a morally significant choice just where one really does have reasons for alternative options; for then the choice can be *free*, no factor but the choosing itself *settling* which alternative is chosen.”).

112. See, e.g., *Seinfeld: The Summer of George* (NBC television broadcast May 15, 1997).

113. This discussion will assume that the benefit in question is something it is permissible for the recipient to have. If it is wrong for her to obtain the benefit, it is a separate question whether obtaining it *through free-riding* is an additional wrong.

gests the following ethical bottom line: a free-rider who obtains something she already had decisive reason to seek at her own expense bears an obligation to contribute something if asked by the party whose investment created the free-riding opportunity.¹¹⁴

This expectations-focused approach to the ethics of free-riding does an excellent job explaining the examples that crop up in the philosophical literature. In every example where free-riding is deemed permissible, the benefit obtained seems to be one the free-rider lacked decisive reason to pursue independent of the free-riding opportunity. Of course Nozick's public address system example fits this description, for the free-rider in that example (presumably) would not have found it exceptionally important to organize his neighbors' broadcasts. Consider some additional examples from Richard Arneson: a typical benefit-recipient would not be obligated, he believes, to contribute to cooperative schemes that give gifts to neighborhood residents on their birthdays, communicate pleasant and edifying messages via skywriting, or provide exposure to very stylish fashions.¹¹⁵ The average beneficiary of such arrangements would not have had a decisive reason to try to obtain the benefits had the arrangements not been in place. By contrast, nearly all examples of intuitively objectionable free-riding involve benefits that the free-rider had overwhelming reason to acquire *ex ante*.¹¹⁶ Such benefits include protection from mortal threats,¹¹⁷ breathable air,¹¹⁸ and drinkable water.¹¹⁹ Other examples involve benefits that are indispensable, not for everyone, but for at least those particular individuals whose free-riding is being scrutinized. So, if a fisherman depends on a particu-

114. The proposal here comes closest to George Klosko's rule against free-riding. His rule is significantly more lenient, however, because he would condemn only free-riding to obtain goods that *everybody* needs—that is, goods “that can be presumed to be necessary for an acceptable life for all members of the community.” Klosko, *supra* note 106, at 247.

115. See Arneson, *supra* note 106, at 618, 620–21. Some of Arneson's cases are arguably counterexamples to Wendy Gordon's view that it is wrong not to contribute when one accepts a benefit deliberately, without improving it, while knowing that the benefit-providers are demanding compensation less than the value that the benefit-recipient has received. See Gordon, *Restitutionary Impulse*, *supra* note 13, at 169–70.

116. The only apparent exceptions are misleading because they involve free-riding behavior that is morally impermissible for independent reasons. Kent Greenawalt's example of housing development residents who use the development's tennis courts without abiding by the official rules for contributing to their upkeep seem criticizable simply because they are violating a landowner's property right. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 123–24 (1987). By contrast, if the example involved some opportunity for recreation that a group of individuals maintained on the unowned open seas, it would be far less convincing. And Garrett Cullity's example of the person who literally free-rides on public transit may be a case of using something that the free-rider in fact did have decisive reason to work for—namely, a cheap and reliable means of transportation—or else of failing to contribute to providing a good that must be provided for reasons of distributive justice. See Cullity, *supra* note 106, at 6.

117. See Klosko, *supra* note 106, at 249–50.

118. See *id.* at 250.

119. See *id.*; Simmons, *supra* note 106, at 325–26.

lar source for fish that is being threatened by pollution, he has decisive reason to work to reverse the decline in water quality.¹²⁰ Similarly, a mariner who must navigate at night has decisive reason to support the construction and maintenance of lighthouses while the land-bound might not.¹²¹

Free-riding is therefore unfair and morally impermissible in only a limited range of circumstances. When the benefit-recipient has a decisive reason to obtain the benefit even at a cost to herself, independent of the opportunity to obtain the benefit by free-riding, and the benefit-provider seeks compensation for his or her own investment in making the benefit available, free-riding is impermissible.¹²² But if the benefit-recipient's reasons for obtaining the benefit are largely based on the benefit-provider's own actions and the recipient has done nothing to encourage the provider's expectation of contribution, free-riding is unobjectionable.

An expectations-focused approach to the morality of free-riding suggests the misappropriation case law has taken a serious wrong turn by condemning essentially all free-riding. Yet someone might wonder about the equation of free-riding and misappropriation. Misappropriators, the objection might go, seem to *take something* that belongs to others, seem to "appropriate" someone else's "harvest," as the *INS* Court would put it.¹²³ It is misleading to say *INS* merely benefited from the AP's efforts for free.¹²⁴ So (on this objection) comparisons to free-riding examples from the philosophical literature are inapt.

The challenge for this objection, however, is to identify what it was that the *INS* took and to explain why the *INS* was forbidden to take it. Of course, the *INS* did not take the news itself away from anybody. The AP still had full ability to transmit information to its members, and the AP's members still had full ability to use it in their papers. Nor can the objection be that the *INS* took licensing revenues from the AP. That would scarcely distinguish misappropriation from free-riding: both would simply amount to benefiting without paying.¹²⁵ And the question would remain why the AP was entitled to those

120. See Cullity, *supra* note 106, at 11.

121. See DAVID GAUTHIER, *MORALS BY AGREEMENT* 96–97 (1987).

122. This article will set aside the important question of what the proper amount of compensation should be. The answer is surely complicated and depends on background conditions of distributive justice and perhaps other factors, too. The foregoing analysis does suggest, however, that the compensation should not exceed the costs that the benefit-recipient had independent reason to bear for the benefit being provided. In this respect, the proper remedy for morally objectionable free-riding would seem limited at the upper end to the free-rider's unjust enrichment.

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

124. Cf. Gordon, *Gleaning*, *supra* note 13, at 2420 ("In most of the cases where the 'reap without sowing' command has been recognized, like *INS*, the situation isn't simply one where the defendant has benefited without paying. Rather, the benefit is taken at the expense of the plaintiff.").

125. The objection would also fail to explain the wrongfulness of the *INS*'s actions. Depriving the AP of licensing revenues is wrongful only if it had a right to them. Insisting on

revenues.

Perhaps the INS could be accused of taking away customers from the AP and its members. If the INS had not copied news from the AP, more newspaper readers would have purchased copies of AP members' publications, and some INS subscribers might ultimately have tried to gain membership in the INS's more dependable rival. But did the AP or its members have a right to this patronage? Such a right would be something of an anomaly, given the moral and legal norms that generally give competitors great leeway to act in ways that hurt one another's economic interests. According to these background norms, the competitors' interests are not the only relevant ones. Members of the consuming public themselves have strong interests in robust competition, and so restrictions on competition (besides those that involve deception or harm to consumers) are rather rare.¹²⁶ To be sure, such consumer interests can be weakened in particular circumstances—for instance, when the consumers are contractually obligated to give their business to the aggrieved competitor. In circumstances like that, inducing consumers to violate their contractual obligations in such situations may be improper. Indeed, such inducement amounts to a tort: tortious interference with contract.¹²⁷ But in the misappropriation context, the defendant does nothing to induce wrongdoing by the consuming public unless members of the public are themselves obligated not to use the misappropriated material without compensation. And the consuming public is not obligated to abstain from using that material unless it is morally impermissible for them to free-ride. Thus, once again, it is hard to see how the wrongfulness of misappropriation can be teased apart from the wrongfulness of free-riding. Because philosophical analysis suggests free-riding is morally impermissible in only a specific subset of cases, it follows that courts in misappropriation cases have been too indiscriminate in their ethical disapproval of free-riders.

III. MISAPPROPRIATION'S COPYRIGHT PREEMPTION PROBLEM

Lately, courts have been abandoning ethics-based approaches to the misappropriation doctrine. They have done so, ostensibly, on the ground that ethics inevitably leads to misappropriation's preemption by federal copyright law.¹²⁸ In the process, these courts have suggested that an incentives-based approach to the doctrine stands a better chance of avoiding preemption. As this Part shows,

such a right reformulates the anti-free-riding conclusion but does not justify it.

126. When a competitor's purpose is nothing other than harming his rival, the latter may have a valid complaint. *See, e.g.*, *Tuttle v. Buck*, 119 N.W. 946, 948 (Minn. 1909) (“[W]hen a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business . . . he is guilty of a wanton wrong and an actionable tort.”).

127. *See, e.g.*, Charles E. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 764–68 (1928) (collecting cases).

128. *See supra* notes 14–22 and accompanying text.

however, even incentives-based approaches to the misappropriation doctrine face a serious challenge in the Copyright Act's preemption provision. After explaining the challenge and the reasons why incentives-based approaches are unlikely to overcome it, the Part proceeds to identify the characteristics that misappropriation doctrine would need to have to avoid preemption.

A. *The "Qualitative Difference" Requirement*

The U.S. Constitution empowers Congress to enact copyright legislation¹²⁹ and preempts contrary state law under the Supremacy Clause.¹³⁰ For these purposes, even state laws that thwart federal copyright policy implicitly are preempted.¹³¹ But in most cases, the copyright preemption analysis centers around the Copyright Act's express preemption provision. Section 301 of the Copyright Act preempts virtually¹³² all "legal and equitable rights" recognized by state law if they (1) concern "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright" and (2) are "equivalent to any of the exclusive rights within the general scope of copyright."¹³³

129. U.S. CONST. art. I, § 8, cl. 8.

130. *Id.* art. VI, cl. 2.

131. *See* *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964); *see also* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964) ("Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws."). Some courts once thought *INS* claims fell under this sort of implied conflict preemption. *See, e.g.,* *Columbia Broad. Sys., Inc. v. DeCosta*, 377 F.2d 315, 318–19 (1st Cir. 1967). But the Supreme Court later moved toward a narrower implied conflict analysis in the course of upholding a California statute criminalizing unauthorized record duplication. *Goldstein v. California*, 412 U.S. 546, 570 (1973); *see also* *Mercury Record Prods., Inc. v. Econ. Consultants, Inc.*, 64 Wis. 2d 163, 178–79 (1974) (invoking *Goldstein* to find misappropriation claims not preempted); *cf.* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) ("Our decisions since *Sears* and *Compco* have made it clear that the Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions."). Some scholars point out that courts should consider obstacle preemption in addition to the Copyright Act's express preemption provisions. *See, e.g.,* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 143 & n.138 (1999); Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 534–35 (1995); *cf.* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) ("Congress' inclusion of an express pre-emption clause does *not* bar the ordinary working of conflict pre-emption principles . . ." (internal quotation mark omitted)).

132. The statute does not preempt state rights relating to any pre-1978 dispute or to buildings. *See* 17 U.S.C. § 301(b)(2), (4) (2006).

133. *Id.* § 301(a); *see also id.* § 301(b)(1), (3) ("Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of ex-

The first condition for preemption, *the subject matter requirement*, requires that a preempted right cover the types of works that fall within copyright's domain.¹³⁴ If a work as a whole comes within the scope of copyright law, the subject matter requirement is satisfied even if the state law rights only protect elements of the work that are uncopyrightable, such as mere ideas or facts.¹³⁵ Because misappropriation claims usually concern the copying of copyrightable works or their parts, the subject matter requirement is usually satisfied in misappropriation cases.¹³⁶ The second preemption condition, *the equivalency requirement*,¹³⁷ is trickier to apply.

For a state law right to be equivalent to a copyright right, it must prohibit the sort of act that would "in and of itself" infringe copyright.¹³⁸ In other words, the state law right must violate the copyright owner's exclusive right to copy the work, to create new works deriving from it, to disseminate copies of it publicly, or to perform or display it publicly.¹³⁹ Then, if the state law right does, say, prohibit the copying of copyrightable material, it still is not equivalent to a copyright right if it depends on some "extra element" that is not necessarily present in copyright infringement.¹⁴⁰ So, for instance, when the state law duty not to copy is contingent on the duty-holder's having contractually promised not to copy, the equivalency requirement is not satisfied because the right depends on an extra element—namely, the existence of an enforceable contract

pression; or . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”)

134. *See, e.g.*, *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004) (“The subject matter requirement is satisfied if the claim applies to a work of authorship fixed in a tangible medium of expression and falling within the ambit of one of the categories of copyrightable works.”).

135. *See, e.g.*, *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011) (en banc); *United States ex rel. Berge v. Bd. of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (“[T]he shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.”).

136. *See, e.g.*, *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.* 650 F.3d 876, 878–79, 902 (2d Cir. 2011) (investment recommendations within written research reports); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 848–50 (2d Cir. 1997) (facts about sports games); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2007) (photographs). *But see Chi. Bd. Options Exch. v. Int’l Sec. Exch., L.L.C.*, 2012 IL App. 102228, ¶ 25 (holding that plaintiffs’ stock market indices were not copyright subject matter).

137. It is also called the “general scope requirement,” but “equivalency requirement” is a less confusing name because the subject matter requirement concerns copyright’s ambit and therefore, in a sense, its scope. Sometimes when courts engage in preemption analysis they discuss copyright’s “scope” and it is not immediately obvious whether they are addressing the subject matter requirement or the equivalency requirement.

138. *E.g.*, *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983), *rev’d on other grounds*, 471 U.S. 539 (1985)).

139. *See* 17 U.S.C. § 106 (2006).

140. *E.g.*, *Computer Assocs. Int’l*, 982 F.2d at 716.

under contract law—that copyright’s duty not to copy does not depend on.¹⁴¹

In the *NBA* case, the complaint against defendant Motorola was focused on its copying and dissemination of information about NBA basketball games.¹⁴² In this way, the misappropriation claim was *prima facie* equivalent to a copyright claim. It complained of the sort of acts—copying and distributing material falling within copyright law’s scope—that in and of themselves would be copyright-infringing. But the equivalency analysis did not end there. The *NBA* court proceeded to identify three extra elements that it said would have to be proved in an *INS* misappropriation claim, but not in a copyright claim: “(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.”¹⁴³ Because of these three necessary extra elements, the court concluded that the misappropriation and copyright claims were not equivalent for preemption purposes. Beyond those three elements, the *NBA* court identified two more necessary conditions for a valid misappropriation claim: the factual information must be generated or collected by the plaintiff at some expense and the defendant must use the information to compete directly with a product or service of the plaintiff.¹⁴⁴ All told, a successful, non-preempted misappropriation claim according to the *NBA* court consisted of five elements:

In our view, the elements central to an *INS* claim are: (i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant’s use of the information constitutes freeriding on the plaintiff’s costly efforts to generate or collect it; (iv) the defendant’s use of the information is in direct competition with a product or service offered by the plaintiff; (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.¹⁴⁵

As noted earlier, however, the Second Circuit recently cast aside this five-element test. According to the court’s decision in *Barclays*, the five elements identified in *NBA* may not in fact suffice for a valid, non-preempted *INS* claim, and *NBA*’s contrary statements are mere dicta.¹⁴⁶ At present, the only respect in which the five-element test remains binding precedent in the Second Circuit is that one of its elements—free-riding by the defendant—is still necessary for a successful misappropriation claim based on the copying of copyright’s subject

141. See, e.g., *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 431–32 (2d Cir. 2012) (collecting cases).

142. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 848–50 (2d Cir. 1997).

143. *Id.* at 853.

144. *Id.* at 852.

145. *Id.*

146. See *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 898–901 & n.32 (2d Cir. 2011).

matter.¹⁴⁷ Apart from that requirement, it remains a mystery what combination of facts would give rise to a valid, non-preempted misappropriation claim where the subject matter requirement is satisfied.

The *Barclays* decision is hard to defend as a reading of *NBA*.¹⁴⁸ But it is now the law, and the *NBA* five-element test is not—at least in the very important Second Circuit. Aside from its questionable interpretation of *NBA*, though, *Barclays* at least has the virtue of sweeping away *NBA*'s doubtful claim that the three identified extra elements saved misappropriation doctrine from preemption.

As Judge Raggi noted in her *Barclays* concurrence, *NBA*'s three extra elements do little to help misappropriation claims avoid equivalency with copyright claims.¹⁴⁹ When it comes to establishing non-equivalency in copyright preemption analysis, not just any additional element will do. For example, although one may infringe a copyright without any intention to do so,¹⁵⁰ adding an intent element to a cause of action that is otherwise equivalent to an action for copyright infringement does not create an extra element of the right sort: such an element, courts have determined, “alter[s] the action’s scope but not its nature.”¹⁵¹ Only elements that alter “the action so that it is *qualitatively* different from a copyright infringement claim” are extra elements that establish non-equivalence and allow the action to avoid preemption.¹⁵² In other words, the

147. *Id.* at 902.

148. The *Barclays* court only paid attention to half of the *NBA* holding. In *NBA*, the court used its five-element test to reject two misappropriation claims brought by the NBA, holding that the NBA could not establish all five elements for either claim. *Nat'l Basketball Ass'n*, 105 F.3d at 853. First, the *NBA* court rejected the NBA's argument that Motorola misappropriated its rights in NBA games or the broadcasts of those games, because the NBA could not show that Motorola competed with it in the market for basketball games or for basketball game broadcasts. *Id.* at 853–54. For this claim, the NBA could not establish element four: Motorola was not using the allegedly misappropriated material “in direct competition with” the NBA's goods or services. *Id.* at 852. Second, the *NBA* court rejected the NBA's argument that Motorola misappropriated its rights in its communications about its games—“e.g., box-scores in newspapers, summaries of statistics on television sports news, and real-time facts to be transmitted to pagers”—because the NBA could not show that Motorola was free-riding on any of those communications. *Id.* at 853. For this claim, the NBA could not establish element three of the court's five-element test: Motorola was not using the allegedly misappropriated material in a way that constituted free-riding on the NBA's “costly efforts to generate or collect it.” *Id.* at 852. Discussing only the second of these rejections, the *Barclays* court was plainly wrong to say, “The *NBA* panel did not decide the case before it on the basis of the presence or absence of direct competition, which it thought to be an element of the preemption inquiry but did not depend upon in its analysis.” *Barclays*, 650 F.3d at 906. Judge Raggi's *Barclays* concurrence, which denied that *NBA*'s five-element test was dictum, offered a much better reading of the case. *See id.* at 907 (Raggi, J., concurring).

149. *Barclays*, 650 F.3d at 909–11 (Raggi, J., concurring).

150. *See, e.g.,* *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931).

151. *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985).

152. *Id.*

extra elements must make the state law claim “different in kind” from a copyright claim.¹⁵³ Every circuit applies this qualitative difference standard when deciding whether extra elements found in a state law claim make it non-equivalent to a copyright infringement claim.¹⁵⁴ And though the Second Circuit itself had done so before *NBA*,¹⁵⁵ the *NBA* court neglected to explain how the extra elements it identified made a hot-news misappropriation claim qualitatively different from a copyright claim. In fact, it did not even mention the requirement that extra elements establish a qualitative difference.

So do *NBA*'s three extra elements create a qualitative difference between misappropriation and copyright claims? The first extra element, the misappropriated material's time-sensitive value, does not. To some degree the value of any copyrightable material is time-sensitive because its popularity with consumers will vary over time. Moreover, the value of much copyrighted material is, like the news, most heavily concentrated in the period immediately after its initial release. Although the value of news may be more time-sensitive than usual, whatever difference exists here is a clear difference in degree, not a qualitative difference or difference in kind.

The second extra element fares no better. All unauthorized copying involves some sort of free-riding.¹⁵⁶ At first glance, though, *NBA* seems to draw a line between free-riding and what might be called discounted-riding. The court emphasized that Motorola had spent its own resources to collect the information for its pagers even though it did not pay the NBA anything.¹⁵⁷ So while Motorola avoided having to invest in producing the underlying games, the information did not come to it *free*. But if free-riding really occurs only

153. See, e.g., *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 789 (5th Cir. 1999); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992); *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 677 n.26 (7th Cir. 1986).

154. See, e.g., *Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 311 (4th Cir. 2012); *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 980 (9th Cir. 2011) (en banc); *Stuart Weitzman, LLC v. Microcomputer Res.*, 542 F.3d 859, 864 n.5 (11th Cir. 2008); *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik*, 510 F.3d 77, 102 (1st Cir. 2007); *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1199 n.2 (10th Cir. 2005); *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005); *Stromback v. New Line Cinema*, 384 F.3d 283, 301 (6th Cir. 2004); *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004); *Carson v. Dynegy, Inc.*, 344 F.3d 446, 456 (5th Cir. 2003); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324 (Fed. Cir. 2003); *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 217–18 (3d Cir. 2002); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1304 (D.C. Cir. 2002); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 431 (8th Cir. 1993).

155. E.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716–17 (2d Cir. 1992).

156. Cf. Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 162 (1997) (arguing that “free-riding . . . may be a pejorative description of copying, but it is still copying.”).

157. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 854 (2d Cir. 1997).

when the free-rider bears no costs at all, there may be no such thing as a free ride. Even the INS spent resources having employees collect and copy news from the AP's bulletins. More importantly, on an incentives-based account of misappropriation, why should it matter whether the defendant spent *nothing*? The relevant question is the effect of the defendant's actions on the availability of socially beneficial goods. The concern is not whether the defendant's copying saves him from every expense, but with whether it saves him enough of the usual expenses (1) that he no longer has adequate incentives to make socially beneficial investments on his own or (2) that his competitors who bear the usual expenses are so disadvantaged that they cannot afford to continue making their socially beneficial investments.¹⁵⁸ For the *NBA* court, a free-riding element cannot furnish a difference in kind because on an incentives-based account the extent or degree of the free-riding is what gives rise to the problem.

The third of *NBA*'s extra elements—"the threat to the very existence of the product or service provided by the plaintiff"¹⁵⁹—also seems, at first glance, to be an either/or element, and so possibly the source of a qualitative difference.¹⁶⁰ Either the effect of the defendant's free-riding is so great that the plaintiff no longer provides its goods and services, or it is not. But once again, this first impression is misleading, and for a pair of reasons. First, threats are not the same thing as the harm that they threaten. Threats characteristically represent a chance of harm, and chance is always a matter of degree. Second, the incentives-based account is not concerned only with threats to *the existence* of the misappropriation plaintiff's goods and services. The public is harmed not just by the absence of a good, but also by having not enough or a slightly inferior version of it.¹⁶¹ The *NBA* court itself recognized this point: in other parts of its opinion, it described this element as satisfied whenever "the existence *or*

158. Richard Epstein considers these two possible effects when distinguishing between objectionable and innocuous degrees of free-riding that were present in the *INS* case. The AP had admitted to using its rivals' news items to get tips that it subsequently investigated for itself. This behavior is also a form of free-riding, or at least discounted-riding, but it is not as extreme a form as the INS's copying of others' news without going to the trouble of an independent investigation. Epstein argues that getting to-be-investigated tips from others does not confer enough of an advantage to diminish anyone's incentives to gather news. But, he says, copying facts without independent investigation probably does. See Epstein, *supra* note 108, at 101–02.

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

160. *But see* Ginsburg, *supra* note 156, at 162 ("[W]hether the copying threatens to put the claimant out of business . . . has more to do with the extent of the damage wrought by defendant's copying than with the nature of the rights.").

161. As Judge Richard Posner has explained:

The question is not whether Dow Jones abandons its index, AP its war reporting, the USGA its handicapping, or the NBA its sponsorship of professional basketball; the question is how far these activities may be curtailed if free riding, even on ancillary or derivative products, is allowed.

Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 637 (2003).

quality” of the plaintiff’s goods or services is threatened.¹⁶² If the quality of goods and services is a matter of degree, then so too is the amount their quality is impaired.¹⁶³

In short, none of the extra elements identified in *NBA* is the sort of extra element that helps misappropriation avoid preemption. None makes misappropriation claims qualitatively different from copyright claims. One might wonder, though, whether it is possible to formulate misappropriation in some other way that incorporates qualitatively different extra elements while still maintaining an incentives-based approach overall.

Although this sort of breakthrough is conceivable, the prospect seems dim. The *NBA*’s specific test is, analytically, a very strong statement of the incentives-based approach. After all, that is a large source of its appeal.¹⁶⁴ The preemption difficulty, moreover, is rooted not in some shortcoming of the *NBA* court’s particular proposal, but in the ultimate purpose of the incentives-based approach. Any effort to formulate misappropriation doctrine in terms of incentives is going to need to focus, like the *NBA* court, on the magnitude of the social harm that would follow the free-riding at issue—but of course that is copyright’s primary concern too. As the Supreme Court has interpreted it, copyright’s “ultimate aim” is to promote the public good by providing special incentives to private parties.¹⁶⁵ On incentives-based approaches, misappropriation claims pursue the very same goal as copyright claims, and so we should not expect the elements of the two claims to exhibit fundamental differences.¹⁶⁶ And as will become clear in the next section, incentives-focused formulations

162. See *Nat’l Basketball Ass’n*, 105 F.3d at 845, 852 (emphasis added).

163. See, e.g., Posner, *supra* note 161, at 637 (describing “the output effects” of misappropriators’ free-riding as “a continuous phenomenon” rather than a “dichotomous” one).

164. See, e.g., Richard A. Epstein, *The Protection of “Hot News”: Putting Balganesch’s “Enduring Myth” About International News Service v. Associated Press In Perspective*, 111 COLUM. L. REV. SIDEBAR 79, 86 (2011) (praising the *NBA* opinion as excellent, notwithstanding doubts about the particular outcome of the case).

165. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . .”).

166. This sort of point was made decades ago in a pre-*NBA* discussion of misappropriation claim preemption:

The “goal” underlying copyright law is the same as that driving the tort of misappropriation: balancing the need to provide economic incentives for authorship against the preservation of the freedom to imitate. Given the identical goals of the tort of misappropriation and the Copyright Act, we would be inclined to hold that § 301 always preempts the tort of misappropriation.

We hesitate to go so far, though, because Congress clearly intended to preserve some form of the tort of misappropriation.

Nash v. CBS, Inc., 704 F. Supp. 823, 834 (N.D. Ill. 1989), *aff’d on other grounds*, 899 F.2d 1537 (7th Cir. 1990). The court proceeded to cite section 301’s legislative history to hold that hot news claims were not preempted; it did not attempt to justify that result analytically. See *id.* at 835.

of misappropriation doctrine stand even less a chance of avoiding preemption given what counts as a qualitative difference in the copyright preemption case law.

B. *The Qualitative Difference Between In Rem and In Personam Rights*

Ever since the Seventh Circuit upheld a standard form software license agreement in *ProCD, Inc. v. Zeidenberg*,¹⁶⁷ courts have routinely held that contractual duties are different in kind from copyright duties—even when they forbid the copying of material falling within copyright’s scope. In that case, the plaintiff had sold a software database of telephone directory information, and to use the software the defendant had to agree (among other things) not to resell the information for commercial gain.¹⁶⁸ The *ProCD* case is well known for declaring this sort of license agreement effective under state contract law, but it further held that the plaintiff’s contract right was not preempted by the copyright statute because rights created by a contract are not equivalent to the rights created by copyright law. The latter, according to *ProCD*, “restrict the options of persons who are strangers to the author.”¹⁶⁹ But as far as contract terms are concerned, “strangers may do as they please, so contracts do not create ‘exclusive rights’” in the sense that copyright law creates exclusive rights.¹⁷⁰ The *ProCD* court thus identified a contractual right as non-equivalent to a copyright right because the former binds only those who have promised to respect it while the latter is “a right against the world.”¹⁷¹ Since *ProCD*, many courts have endorsed these grounds for declaring contract rights not equivalent to copyright claims.¹⁷² The Second Circuit, for instance, recently declared a contract claim qualitatively different from a copyright claim because it “asserts rights only against the contractual counterparty, not the public at large.”¹⁷³

In taking this approach to the equivalency requirement in contract cases,

167. 86 F.3d 1447 (7th Cir. 1996).

168. *See id.* at 1450, 1452.

169. *Id.* at 1454.

170. *Id.* (quoting 17 U.S.C. § 106 (2006)); *see also id.* (“Someone who found a copy of [the plaintiff’s software] on the street would not be affected by the shrinkwrap license—though the federal copyright laws of their own force would limit the finder’s ability to copy or transmit the application program.”).

171. *Id.* at 1454.

172. *See, e.g.,* *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011) (en banc) (describing an implied-in-fact contract as “unlike a copyright that is a public monopoly” (citing *ProCD*, 86 F.3d at 1454)); *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1318 (11th Cir. 2001) (“[C]laims involving two-party contracts are not preempted because contracts do not create exclusive rights, but rather affect only their parties.” (citing *ProCD*, 86 F.3d at 1454–55)).

173. *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 431 (2d Cir. 2012) (citing *ProCD*, 86 F.3d at 1454); *see also id.* at 433 (“A claim for breach of a contract including a promise to pay is qualitatively different from a suit to vindicate a right included in the Copyright Act and is not subject to preemption.”).

these courts are relying on a distinction commonly used by legal theorists to contrast property and contract rights: property rights are rights *in rem* and contract rights are rights *in personam*.¹⁷⁴ As John Austin said, *in rem* rights avail “against persons generally” and *in personam* rights avail against determinate persons.¹⁷⁵ This distinction occasionally surfaces in discussions of misappropriation because the *INS* majority itself seemed to rely on it. The Court stressed that it was recognizing only a “*quasi* property” interest in news—a right against one business competitor, not a right against the whole world:

The question here is not so much the rights of either party as against the public but their rights as between themselves. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. . . . Regarding the news, . . . it must be regarded as *quasi* property, irrespective of the rights of either as against the public.¹⁷⁶

Unfortunately, the court did not much explain its conception of quasi-property rights, and so its relation to the *in rem/in personam* distinction is not entirely straightforward. That is partly because the distinction itself is not entirely straightforward. But clarifying the distinction between *in rem* and *in personam* rights will also help clarify what makes a state law claim qualitatively different from a copyright infringement claim.

There are two principal ways of interpreting the distinction between *in rem* and *in personam* rights. Wesley Hohfeld, writing at roughly the time of the *INS* decision, explained the distinction in terms of the size and open-endedness of the class of duty-holders bound by the correlative right: *in rem* rights are held by one person against “persons constituting a very large and indefinite class of people, while *in personam* rights avail “against a single person (or single group of persons)” or “a few definite persons.”¹⁷⁷ This view of the distinction appears congenial to the *INS* majority’s holding that misappropriation creates something short of a full *in rem* property right, for the quasi-property right recognized by the court does not correlate with obligations held by “a very large and indefinite class of people.”¹⁷⁸ Only people who compete with the AP are bound. But such an understanding of the *in rem/in personam* distinction still would not provide a qualitative difference between the *in rem* rights of copyright law and the rights recognized by *INS* because both numerosity and indefiniteness of a duty-holder class vary by degree.¹⁷⁹ Even in *INS*, the class of

174. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 776–77 (2001).

175. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 369–70 (Robert Campbell ed., 5th ed. 1885).

176. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918).

177. HOHFELD, *supra* note 97, at 72.

178. *Id.*

179. See, e.g., Merrill & Smith, *supra* note 174, at 786.

newsgathering competitors who like the INS are obligated not to reap what the AP sows, while not numerous relative to the total population of possible reapers, is hardly well defined.¹⁸⁰ On the contrary, it seems an open-ended class, and furthermore the rules for classifying a free-rider as a competitor are hardly bright-line. For that matter, the class of users who had agreed to the terms of the software agreement in *ProCD* was potentially rather large, but relatively definite. So the Hohfeldian interpretation of the *in rem/in personam* distinction does not actually help identify a qualitative difference between copyright claims and state law claims and therefore does not save the latter from preemption.

But the second understanding of *in rem/in personam* distinction provides a more useful conceptual tool for copyright preemption analysis. Albert Kocourek, responding to Hohfeld's account, devised a counterexample to Hohfeld's claim that *in rem* rights involve a large number of duty-holders holding more or less the same duty.¹⁸¹ Kocourek identified the possibility of *in rem* rights that imposed duties on only a small class of persons—such as the right of a property owner that a single individual not trespass on her land after the owner had granted easements to everyone else in her jurisdiction except that one individual.¹⁸² Kocourek therefore proposed the following definition: “a right *in rem* is one of which the essential investitive facts do not serve directly to identify the person who owes the incident duty.”¹⁸³ And, conversely, an *in personam* right is simply a right the essential investitive facts of which *do* serve directly to identify the person who owes the incident duty.¹⁸⁴ Unlike Hohfeld's version of the *in rem/in personam* distinction, this version does not turn on matters of degree: either the right is grounded in facts about the duty-holder's identity or it is not.

Putting the Kocourek proposal in terms of duties, one might say that a duty corresponding to an *in personam* right is *agent-specific* because it comes to bind the duty-holder in virtue of facts about his or her identity or other personal characteristics. So, for example, a contractual duty not to copy ProCD's facts is

180. See Balganes, *supra* note 108, at 435.

181. Coincidentally, it may in fact have been *INS* that precipitated Kocourek's skepticism about Hohfeld's account. In a case comment that Kocourek authored while serving as a law review editor, he set out to interpret the *INS* Court's concept of quasi-property in terms of the *in rem/in personam* distinction and at first supposed that the court's quasi-property right was *in personam* because there appeared to be only one duty-holder, the *INS*. Comment on Recent Case, *International News Service v. Associated Press*, 39 *S. Ct.* 68 (1918), 13 *ILL. L. REV.* 708, 715 (1919). But Kocourek ultimately concluded that the right was nevertheless *in rem*. *Id.* at 716. On his reading, the rule established in *INS* was, “No one shall compete with another by systematically appropriating and selling the ideal things (whether objects of property or not, so long as they are vendible) produced by the other.” *Id.* at 719 (emphasis omitted).

182. Albert Kocourek, *Rights in Rem*, 68 *U. PA. L. REV.* 322, 332–33 (1920).

183. *Id.* at 335 (emphasis omitted).

184. *Id.*

agent-specific because its existence is grounded in the duty-holder's having assented to the contract.¹⁸⁵ Many legal duties are agent-specific in this sense. Parents have agent-specific duties to their children in virtue of their identity as the children's parents. Common carriers have agent-specific duties to exercise the utmost care toward their passengers in virtue of their identity as common carriers. Rescuers have agent-specific duties to exercise reasonable care in virtue of having voluntarily assumed the duty by intervening. But many other legal duties are not agent-specific, such as the duty not to kidnap someone and the duty not to infringe a copyright. In determining that contractual rights were not equivalent to copyright's rights against the world, the *ProCD* court seemed to have something like the concept of agent-specific duties in mind. And contract duties are indeed agent-specific while copyright duties are not. The agent-specificity of contractual duties, therefore, is the qualitative difference that distinguishes breach of contract from copyright infringement.

The idea that agent-specific legal duties can avoid preemption is supported by other copyright decisions as well. Consider claims based on a breach of a fiduciary duty or a breach of confidence. Such claims involve agent-specific duties because they depend on a special kind of relationship between the right-holder and the duty-holder, which the right-holder does not have with the rest of the world. And courts have indeed found such claims qualitatively different from copyright claims.¹⁸⁶ By contrast, tortious interference with contract—which involves a duty that is not agent-specific because *everyone* is prohibited from intentionally inducing third parties to break their contracts with others—is preempted.¹⁸⁷

The concept of agent-specific duties thus helps explain why some state law claims are qualitatively different than copyright claims, but it does not offer much help for incentives-focused formulations of misappropriation doctrine. There is no straightforward way to derive agent-specific duties from that sort of justification. If the aim of misappropriation doctrine is to prevent actions that imperil the availability of certain public goods, anyone whose actions have that unwelcome result will be duty-bound irrespective of facts about them in particular. In theory, the best way to promote the availability of certain public goods could be to create and enforce agent-specific duties. But there is no reason to

185. See Michael E. Kenneally, *Commandeering Copyright*, 87 NOTRE DAME L. REV. 1179, 1237 (2012) (“[T]he license only imposed a duty not to copy the directory on specific individuals who were in privity with ProCD.”).

186. See, e.g., *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 981 (9th Cir. 2011) (en banc); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992).

187. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). But see *Star Patrol Enters., Inc. v. Saban Entm't, Inc.*, No. 95-56534, 1997 WL 683327 (9th Cir. Oct. 23, 1997) (stating that claims for inducing breach of contract are generally not equivalent to copyright claims while noting that there was no circuit precedent directly on point).

assume that a substantively defensible incentives-focused formulation of misappropriation could be built around agent-specific duties. The *NBA* court, for instance, did not propose an agent-specific duty not to misappropriate when it prohibited *anyone* from free-riding on the right-holder's investments in time-sensitive information to produce a directly competing product, when having the ability to free-ride would threaten the right-holder's incentives to create the product in the first place.¹⁸⁸ This *NBA* duty is complex and perhaps even narrow, but it does not bind duty-holders in virtue of facts about their individual identities or other personal characteristics, and so it does not correlate to an *in personam* right that qualitatively differs from copyright.

Shyamkrishna Balganesesh's nuanced account of the misappropriation doctrine may be the rare attempt to combine a focus on incentives with agent-specific duties. In Balganesesh's view, misappropriation is fundamentally concerned with providing incentives to produce public goods.¹⁸⁹ He also argues, however, that the doctrine imposes duties only on the right-holder's direct competitors,¹⁹⁰ and his conception of this direct competitor limitation does seem to make misappropriation duties agent-specific: one cannot tell whether a defendant is a direct competitor of the plaintiff without considering the defendant's particular characteristics.¹⁹¹ Even so, this combination of agent-specific duties and an incentives focus is somewhat unstable. By Balganesesh's own lights, the justification for the direct competitor limitation derives from highly contingent features of the public good in question. He finds the direct competitor limitation warranted because it was socially beneficial, in *INS*, to encourage the parties to cooperate with each other in the production of the relevant public good.¹⁹² On an incentives-focused account, however, such cooperation is worth encouraging only to the extent that it increases the availability of the public good. It is not at all clear which sorts of misappropriated goods are best produced through cooperation between competitors and which are not, and courts are particularly ill-equipped to make such calls. Even assuming the news was such a good in 1918, misappropriation doctrine continues today in different circumstances and extends to many other goods besides the news. Thus, although Balganesesh's proposal may help support the result in *INS* at the time the case was decided, its generalizability and usefulness to the doctrine today are open to doubt.¹⁹³

By contrast, as the next Part argues, a sound ethics-focused formulation of the doctrine can successfully ground the duty not to misappropriate in particu-

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

189. *See* Balganesesh, *supra* note 108, at 454–55.

190. *See id.* at 435–36.

191. *See id.* at 474.

192. *See id.*

193. This result, it should be noted, seems consistent with Balganesesh's own aims. *See id.* at 497 (describing the misappropriation doctrine as “a structural solution unique to the peculiarities of one industry”).

lar facts about the free-rider's personal characteristics. In this way, an ethics-based account of the doctrine not only justifies the doctrine's existence; it also preserves the doctrine from preemption going forward.

IV. REFORMULATING MISAPPROPRIATION DOCTRINE IN ETHICAL TERMS

Part II argued that free-riding is not unfair across the board, but rather only when the free-rider would have had a decisive reason to obtain the benefit at his or her own expense if no free-riding opportunity had arisen. This understanding of the morality of free-riding points the way forward for a new formulation of misappropriation doctrine in ethical terms. And because this formulation would focus on the defendant's particular reasons for obtaining the misappropriated material, and thus on the defendant's personal characteristics, the duties it imposed would be agent-specific and so would avoid preemption.

Without question, though, it is not always easy for one person to determine when another has decisive reason to pursue some good. The doctrine would be easier to apply in practice if it employed a more familiar concept that third-parties, especially courts, could wield more easily. A good candidate would be *need*, for if a person needs something, he or she usually has decisive reason to pursue that thing even at some personal cost. Just think of some of the examples that were discussed above. People generally need a safe water supply and protection from violent threats, but many do not need exposure to the latest fashions or pleasant sky-writing.¹⁹⁴ Having a need for something is thus a pretty good indication that one has a decisive reason to pursue it at some cost. So courts in misappropriation cases should be on the lookout for free-riders who are attempting to obtain a benefit that they already had need of, because it is in those cases that free-riding is likely unfair.

Consider again the *INS* case. The proposed account handily explains why this case has seemed to many observers to involve morally objectionable behavior. It turns out the news the *INS* copied was news it would have needed to report irrespective of the AP's having presented a tempting opportunity for free-riding. In his dissent, Justice Brandeis explains that the *INS* litigation arose after the *INS* suddenly lost its access to European news, which it sorely needed because World War I was underway.¹⁹⁵ When the litigation reached the Supreme Court, the AP's evidence indicated the *INS* had really only copied news relating to the war.¹⁹⁶ Because, as the AP claimed, this news was "of the great-

194. See *supra* notes 115–119 and accompanying text.

195. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 263 (1918) (Brandeis, J., dissenting). Justice Brandeis also hints at the reason for the *INS*'s loss of access: the British and French governments were displeased by the *INS* newspapers' reporting, and so they prohibited the *INS* from using their transatlantic telegraph lines. See *id.*; see also Baird, *supra* note 4, at 26–27 & n.42.

196. See Baird, *supra* note 4, at 22 n.28.

est importance and of intense interest to the newspaper reading public,"¹⁹⁷ it is safe to say that the INS, a newsgathering agency responsible for distributing the most important news to its subscribers, independently needed the news it copied from the AP.¹⁹⁸ And it further seems likely the INS would have had decisive reason to spend resources to obtain the war news if it had not found a way to free-ride on the AP's efforts. Thus the Court was right to conclude that the INS had behaved unethically, although it did not adequately explain the rationale behind that conclusion.¹⁹⁹

On this understanding of *INS* and the relevant ethical issues, a misappropriation-based unfair competition claim should succeed when the defendant freely uses an intangible good that the plaintiff produced at some expense and the defendant independently needed. Because this account of the duty not to misappropriate turns on the defendant's particular need for the good, it imposes an agent-specific duty grounded in the defendant's personal characteristics, and so survives preemption.²⁰⁰ The specific free-riding punished in *INS* could therefore have been prohibited by a formulation of misappropriation doctrine that would avoid preemption by the federal copyright statute.

But note that misappropriation cases rarely involve this sort of genuinely unethical free-riding. Most misappropriating free-riders seem to have decided to obtain the resource because it was there for the taking. Recall that in the *NBA* case Motorola was sued for providing real-time statistical updates for professional basketball games.²⁰¹ It is quite unlikely that if the NBA had not already been in existence, Motorola would have felt a need to organize a professional basketball league to generate game scores and other information that it could then transmit to customers for profit. Motorola developed its product only because NBA games already existed (and were so popular that there was a demand for timely statistical updates). The company, then, was the sort of free-rider whose decision to accept a benefit depended on the benefit-provider's having made it available.²⁰² Accordingly, this article's proposal supports the outcome in *NBA* too.

Many other decisions, however, probably should have come out the other way, including the successful misappropriation claim in the *Met Opera* case

197. *See Int'l News Serv.*, 248 U.S. at 263 (Brandeis, J., dissenting).

198. *See, e.g.*, Epstein, *supra* note 108, at 105 ("Pirating stories became necessary to keep INS papers in competition with their AP rivals . . ."); *cf.* Baird, *supra* note 4, at 27 ("INS's need for a source of war news had disappeared by the time the case came to the Supreme Court, as the censorship ban had been lifted well before then.")

199. It is, however, a separate question whether the Court should have remedied this wrongdoing through an injunction rather than an award of monetary relief. The question of what the standard remedy for misappropriation should be is beyond the scope of this article. For a persuasive argument in favor of a monetary remedy in *INS*, see Epstein, *supra* note 108, at 117–19.

200. *See supra* Part III.B.

201. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997).

202. *See supra* section II.C.

where the defendant was found liable for copying the Met's radio broadcasts.²⁰³ There was no indication in that case that the defendant needed and would have paid for the performances that the Met broadcasted if the opera company had not been broadcasting them freely. On the contrary, it seems the defendant chose to record those performances only because the broadcasts were already scheduled to happen.

Even in the news aggregating cases that seem factually nearest to the original *INS* dispute, much copying seems to be of material the aggregator did not independently need. One suspects All Headline News had no great need for the stories it allegedly misappropriated.²⁰⁴ These boasted such titles as "8 Foot Alligator That Killed Elderly Woman Captured in Georgia Pond Police Say" and "Inspection Squads to Seek Out Dirty Toilets in Malaysian State's Tourist Spots."²⁰⁵

Aside from *INS* itself, the closest example of a misappropriation claim that should have succeeded under this article's proposal would come from the dispute over unauthorized use of financial indices.²⁰⁶ A company whose business consists of selling a variety of investment products probably *does* need a product that allows investors to hedge against systemic risk running throughout an entire market. If the best way of producing such a product is by using a market index,²⁰⁷ the company further will have to have a market index on hand. Even here, though, it is doubtful that the company would *ex ante* need any particular index, like the Dow Jones Industrial Average or the S&P 500, unless some such index constituted the only reliable way to measure overall market performance.²⁰⁸

In all events, a plausible ethics-based approach to misappropriation will justify a relatively narrow set of claims. The set will certainly be smaller than would be produced by unreflective appeal to courts' intuitive conceptions of "commercial immorality," especially since some judges seem to think all free-

203. See *supra* notes 57–60 and accompanying text.

204. See *generally* *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

205. First Amended Complaint at 18–19, *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 08 Civ. 323). The other news stories seem only slightly more important: they contained information about a university speaking invitation from Mahmoud Ahmadinejad to George Bush; a Sri Lankan sea battle; AOL layoffs; and a Brazilian surrogate mother who had given birth to her own grandchildren. *Id.*

206. See *supra* note 73 and accompanying text.

207. *Cf.* *Bd. of Trade v. Dow Jones & Co.*, 98 Ill. 2d 109, 113 (1983) ("An investor who holds a diversified stock portfolio may 'hedge' against systematic risk by entering into a stock index futures contract predicting that the market index would decline.").

208. In the most recent Illinois case, the defendant had in fact spent its resources creating a market index of its own, but that index evidently did not have a lot of name recognition. *Chi. Bd. Options Exch. v. Int'l Sec. Exch., L.L.C.*, 2012 IL App. 102228, ¶ 12. So in using better-known indices like the S&P 500, the defendant's actions seem mostly like an unobjectionable response to an opportunity that already existed rather than an effort to avoid bearing costs it had a preexisting decisive reason to be willing to bear.

riding is morally suspect.

It might still be objected, though, that the aim of prohibiting unethical competitive behavior is not itself sufficient normative support for misappropriation doctrine. If misappropriation doctrine does nothing more than protect commercial actors from unfair mistreatment by their rivals, why bother? The law understandably turns a blind eye to many other forms of unfairness, often because the costs of trying to eradicate unfairness can be very high. According to this objection, it may not be in society's interest to have misappropriation doctrine given the ethics-based account of its ends. By contrast, it is easy to see the value of a misappropriation doctrine that provides socially beneficial incentives.

This objection overstates the conflict between the current proposal and incentives-based accounts of misappropriation. It is certainly true that the proposed formulation of the doctrine rests on moral considerations and not economic ones, but that does not mean it will have negative economic consequences overall.²⁰⁹ On the contrary, it is quite possible that the proposal would produce socially beneficial incentives. By preventing misappropriation when the free-rider had an independent need for the misappropriated material, the proposal gives special incentives to invest in producing material that is especially important to potential free-riders' personal welfare. And since the focus of misappropriation doctrine is on free-riders who are engaged in commerce, these incentives would indirectly be based on the welfare of the consuming public the free-rider aims to serve. Put simply, the proposed account is likely to provide an extra incentive when the benefit is central to the well-being of many within society.

Of course that is not to say the proposal perfectly overlaps the best incentives-oriented formulation. In individual cases, the proposal will surely result in outcomes that the incentives-based approach considers wrong. For one thing, a society's *independent* need for some intangible good like news does not always determine how much the resource contributes to social welfare. A resource can be extremely beneficial to society even if no one had decisive reason to create it initially. Indeed, the boldest, least foreseeable innovations can have the greatest social value. And so a different account of misappropriation doctrine might identify superior incentives for investing in intangible resources.²¹⁰

When it comes to contributing to social welfare, however, this article's ethics-based approach does have one advantage over the *NBA* test and other formulations in terms of incentives. Recall that the incentives-based approach cares most about the effect of the defendant's free-riding on the availability of

209. Cf. Henry E. Smith, *An Economic Analysis of Law Versus Equity* (March 27, 2012) (unpublished manuscript), available at <http://www.law.uchicago.edu/files/files/Smith%20paper.pdf>.

210. But if, as Part III argued, no such account survives existing copyright preemption doctrine, this possibility does not weigh very heavily against the Article's proposal.

the plaintiff's socially valuable goods.²¹¹ The defendant, however, is not well placed to make a predication about the likely consequences for the plaintiff's business. The essential facts for such a prediction likely lie with the plaintiff. So on the incentives-based approach, a potential misappropriation defendant will have some difficulty determining his or her potential legal liability, and therefore will need to incur added expenses to obtain the key information.²¹² By contrast, the defendant is the party best situated for determining whether, in free-riding, he would be obtaining a benefit that was necessary from his own point of view. Although courts may ultimately dispute a defendant's claim not to have needed the benefit, the defendant nevertheless holds the information on which the court's ultimate conclusion will be based. In this way, the proposal defended here does not force duty-holders to spend their resources on lots of new information for the sake of determining whether they will incur misappropriation liability. In other words, this proposal avoids information costs that are a central feature of incentives-based accounts.²¹³

Ultimately, no one knows for sure how to formulate misappropriation doctrine to maximize social welfare. Given the current state of the empirical evidence, it is not clear precisely what incentives encourage the best investments in information or other intellectual goods without excessively restricting the public's access to those goods.²¹⁴ Without some way of identifying the optimal set of misappropriation incentives, one should not simply oppose all ethics-centered formulations of misappropriation because the incentives they produce *might* not prove best overall. If such a formulation is plausible enough on its

211. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 852–53 (2d Cir. 1997). See also *McKevitt v. Pallasch*, 339 F.3d 530, 534–35 (7th Cir. 2003) (Posner, J.) (identifying the expected negative effect of the defendant's free-riding on the plaintiff's goods and services as the most important element in the *NBA* analysis).

212. Alternatively, the defendant might refrain from engaging in the free-riding, regardless of whether the free-riding would prove socially harmful. This chilling effect would also be an unwelcome result from society's perspective.

213. Prospective misappropriation *plaintiffs*, on the other hand, might still have to invest in information in order to determine whether their rights have been violated. They might not always know when the benefit was one that the defendant independently needed. The *NBA* court's incentives-based formulation has its own version of this problem, however, since prospective plaintiffs must determine whether the defendant had engaged in acts meeting the Second Circuit's definition of free-riding. And that definition is anything but clear. See Balganes, *supra* note 22, at 140 (faulting the *Barclays* majority for not "answering a rather fundamental question about the nature of 'free riding' on which it placed all its normative emphasis" (emphasis omitted)).

214. Not everyone agrees that society needs a misappropriation doctrine to provide special incentives. See, e.g., Posner, *supra* note 161, at 638–39, 641. Even in core areas of intellectual property, it is hard to tell what combination of incentives optimally balances the law's twin goals of encouraging investment and allowing access. See, e.g., RONALD A. CASS & KEITH N. HYLTON, *LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* 45 (2013); MERGES, *supra* note 79, at 2–3; William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 181 (Stephen R. Munzer ed., 2001).

own terms—if it really does protect commercial actors from unfair mistreatment by their rivals—and does not appear to impose unacceptable social costs, that is support enough.

CONCLUSION

This article has argued that the misappropriation doctrine should once again be formulated in overtly ethical terms to combat unfair types of competition. Contrary to conventional wisdom, such a formulation stands a better chance of avoiding preemption by copyright law than the incentives-based approach that has supplanted it. But for its part the original version of courts' ethics-based approach to misappropriation also stands in need of improvement. The common belief that free-riding is more or less always unethical cannot be defended. Free-riding, the article has argued, is unethical only in limited circumstances—namely, when the free-rider is attempting to obtain a benefit that he or she already had decisive reason to pursue at some personal expense. Misappropriation claims should therefore succeed only when the defendant needed the misappropriated material before he or she contemplated getting it through free-riding on the plaintiff's efforts.

The misappropriation doctrine in particular benefits a great deal from a reexamination of the moral permissibility of free-riding, but so too does intellectual property law more generally. Many who wonder about the proper scope of intellectual property rights are tempted to make—in Rochelle Dreyfuss's memorable phrasing—the “if value, then right” assumption.²¹⁵ Free-riding just seems fishy, on this view, because it means that someone who did not work to produce a social good will receive a benefit that could have gone to the party who did put in the work. Scholars have offered economic reasons for thinking that is not necessarily a problem.²¹⁶ But it is also worth emphasizing that free-riding is not always a moral problem either. Commonplace concerns about free-riding, like the ones Rupert Murdoch and other critics of news aggregation try to tap into, have an unmistakable moral flavor. Moreover, it may be these moral convictions that ultimately move the law the most.²¹⁷ If lawmakers are to avoid making bad intellectual property law, they need a firm grasp on not just the economics of free-riding, but its morality too.

215. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405–06 (1990).

216. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1046–50 (2005).

217. Cf. Harvey S. Perlman, *Taking the Protection-Access Tradeoff Seriously*, 53 VAND. L. REV. 1831, 1834 (2000) (“If we have no solid ground upon which to answer [intellectual property’s fundamental economic] question, should we be surprised if the claims for expanding property rights continue to erode the claims of those who ask for the right to ‘reap where they have not sown?’”).