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THE PROTECTION OF “HOT NEWS”: PUTTING BALGANESH’S “ENDURING MYTH” ABOUT *INTERNATIONAL NEWS SERVICE V. ASSOCIATED PRESS* IN PERSPECTIVE

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*Response to: Shyamkrishna Balganesh, “Hot News”: The Enduring
Myth of Property in News, 111 Colum. L. Rev. 419 (2011).*

INTRODUCTION

In his thorough and elegant article,¹ Professor Shyamkrishna Balganesh joins the many prominent writers who have cast a hard look on Justice Mahlon Pitney’s opinion in the much mooted case of *International News Service v. Associated Press*.² Overall, Balganesh is sympathetic to Justice Pitney’s position, which denies full property protection to what Balganesh calls “hot news”—quite literally news that was hot off the press, in a day when we had presses—while at the same time shielding the creators of that news from direct competition by rival providers. On balance, I think that Balganesh reaches the right result in his defense of *International News*. But we differ sharply in how best to achieve that result.

More concretely, Balganesh takes it as his core mission to explode an “enduring myth” that this decision enshrined an era of “property” in news, which is good against the entire world, as most property rights are. My view is that there is no enduring myth to dispel. I quite agree with Balganesh that the property rights in news cannot be fit into any monolithic conception, which assumes that all property rights are good against the world. That is the position with respect to trespass to land, for example, where all strangers stand in the same relationship with the owner. But that conception does not make sense in a world where competitors and customers operate in very different niches.

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1. Shyamkrishna Balganesh, “Hot News”: The Enduring Myth of Property in News, 111 Colum. L. Rev. 419 (2011).

2. 248 U.S. 215 (1918).

Indeed, I have already written an extended defense of Justice Pitney's decision in this case that celebrates the distinctive feature that Balganesch stresses in this article—the key role of “quasi-property,” which allows for just this differentiation.³

In addressing this thorny question, Justice Pitney got the balance of interests just about right. This happy verdict should come as no surprise, for I have argued elsewhere that Justice Pitney is perhaps the most underrated Supreme Court justice ever, especially with his astute decisions in labor law that have suffered the sharp lash of history.⁴ He outdueled Justices Oliver Wendell Holmes, Jr. and Louis Brandeis in that arena, and the same is true of his excellent opinion in *International News*, which is clearly more persuasive than either Justice Holmes's cryptic dissent⁵ or Justice Brandeis's longer dissent,⁶ opinions that I shall not discuss here. Justice Pitney's worldview stemmed from an uncommonly fine mind that had been well-schooled in the principles of equitable jurisdiction throughout his time as Chancellor of the New Jersey Supreme Court, from 1908 until his Supreme Court nomination in 1912. It was just this knowledge that makes his opinion in *International News* such a bracing read.

In this short response, I hope to show that Justice Pitney's analysis stands well on its own terms, and need not be recast, as Balganesch purports to do, through a novel mixture of the law dealing with misappropriation, unjust enrichment, and restitution. To the contrary, Justice Pitney's own striking, if somewhat discordant, use of the notion of quasi-property well captures the need to distinguish between use by direct competitors in the short run, which should be frowned upon, and the use of that news by the general public, just as Justice Pitney's solution requires. Once the news cycle has run its course, however, the property protection ceases against all persons, just as the term “hot news” suggests. Justice Pitney remains the undisputed champion. There is no myth to dispel.

In order to make out this case, I shall proceed in three parts. First, in Part I, I shall briefly recapitulate the relevant facts in *International News* with an eye toward developing the central thesis. In Part II, I shall develop the conceptual framework that best elucidates the *International News* decision. Finally in Part III, I shall critique Balganesch's efforts to recast the decision in a novel light.

3. Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 Va. L. Rev. 85 (1992) [hereinafter Epstein, *INS*].

4. I have discussed these at length, in Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357 (1983); Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 Yale L.J. 1435 (1983). See, e.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (enforcing yellow dog contracts); *Coppage v. Kansas*, 236 U.S. 1 (1914) (striking down a state collective bargaining law).

5. *Int'l News*, 248 U.S. at 246 (Holmes, J., dissenting).

6. *Int'l News*, 248 U.S. at 248 (Brandeis, J., dissenting).

I. THE BACKGROUND OF *INTERNATIONAL NEWS*

International News offers an instructive window into newsgathering operations as they existed in the early part of the twentieth century. The suit itself was between two rival collectives. The plaintiff, the Associated Press (AP), had about 950 newspaper members; the defendant, the International News Service (INS), had about 400 newspaper members.⁷ Each organization had internal bylaws that allowed them to collect news that could be distributed to each of their respective members, thereby economizing on a major cost of newspaper publishing. In ordinary times, each organization sent its own representatives out into the field in order to gather information for further transmission. Once collected, the information was posted on bulletin boards that allowed their members to use it as the basis for their own stories. Normally, members of both organizations refrained from taking the information from bulletin boards erected by the others, in part because of the fear of retaliation, and in part out of respect for the internal norms of the business. But in October and November 1916, the British and French forces each blocked the INS from using their countries as a base for collection of the latest news on the war, which was of course in great demand throughout the United States.⁸

One distinctive feature of this ban was that it made it virtually impossible for the AP to cooperate with the INS in the collection of information, lest it be tarred with the same brush. Desperate for information on the war, the INS lifted the needed information off the bulletin boards located in New York City—and only in New York City. The INS did not rely on the AP bulletin boards for other markets in which it retained direct access to information. The traditional balance whereby all news services got their “tips” from rival operations, but then investigated the stories themselves, proved stable in the absence of this huge exogenous jolt. As a factual matter, *International News* is as much about how sensible customs, reciprocally enforced, can shape the operation of an intensely competitive industry.

Once that custom broke down, the question was how far were the INS operatives prepared to go. Well aware of the enforceable restrictions of the copyright law, these operatives did not copy down the information displayed on the bulletin board word for word. Instead they distilled the necessary information from the bulletin boards, which they used as the basis for their own work. The system gave them a real competitive boost because, given the three hour time differential, gathering the information early in New York allowed for its successful use by the member newspapers located in the western United States. The central issue in the case was whether some form of novel property right was appropriate to fill the peculiar void in copyright law exposed by the facts in *International News*. Justice Pitney’s decision offers a creative response to that question.

7. Epstein, *INS*, supra note 3, at 90–91.

8. See *Int’l News*, 248 U.S. at 263 (Brandeis, J., dissenting) (describing this problem for INS). This is discussed in Epstein, *INS*, supra note 3, at 92 n.15.

II. A DEFENSE OF JUSTICE PITNEY'S TWO-TIERED PROPERTY SYSTEM

As is commonly understood today, intellectual property law is intended to set up property rights barricades that supplement those that are established beyond the ordinary physical rules of trespass. It is for that reason, for example, that the rights of privacy are invoked against defendants who eavesdrop without trespassing on the plaintiff's land.⁹ Yet, as Justice Pitney well notes, no generalized system of property rights law could ever be allowed to privatize information about the events of the day, which he calls *publici juris*.¹⁰ Such information is incapable of ownership, just as beaches and rivers cannot be reduced to private ownership by barring others from their use or, with rivers and lakes, diverting their entire flow to private usages. It would be impossible to run a competitive industry in newsgathering or publishing if the first person to report a story had an exclusive right to report it forever after—just imagine the melee after a presidential press conference.

The intellectual property world is well aware that information is far more valuable if governed by an open access regime, which is why all of the current systems of intellectual property work around a core that treats ideas and laws of nature as part of the public space.¹¹ Around that core, a cluster of intellectual property rights can flourish when the desirable incentive effects for creation outweigh any loss in the dissemination of the information in question. Everything that Justice Pitney wrote in *International News* builds off this central judgment.

Yet it hardly follows that the categories of protection for various forms of information should be closed by the copyrights and patent law, covering writings and inventions respectively. Most clearly, trade secrets are also a form of property, protected under both state and federal law, and these are created without any centralized government intervention,¹² yet still receive constitutional protection.¹³ Much of the law of privacy has developed to

9. The willingness to recognize wrongs short of trespass dates back to Blackstone who condemned “*eaves-droppers*, or such as listen under walls and windows,” not only for what they saw or thought but also for the “slandorous and mischievous tales” they uttered. 4 William Blackstone, Commentaries *169. For an early modern application, see *Roach v. Harper*, 105 S.E.2d 564, 565 (W. Va. 1958), where the court allowed an action for invasion of privacy when the defendant used a “hearing device” to overhear the plaintiff’s private and confidential conversations in an apartment that he rented to her. In effect, the boundaries of the law moved out modestly on the ground that it was easier for people not to snoop than for them to erect huge barriers against snooping. This expansion of privacy beyond trespass had its clear analogue in the Fourth Amendment law on searches and seizures in *Katz v. United States*, 389 U.S. 347 (1967), which held that a government tap on a public telephone booth amounted to a search or seizure even though the electronic device did not commit a common law trespass inside the wall of the booth.

10. *Int’l News*, 248 U.S. at 234 (“[T]he news element . . . is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”).

11. For patents, see *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); for copyrights, see *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

12. See, e.g., Restatement (Third) of Unfair Competition §§ 38–45 (1995) (discussing trade secrets). At one point, the Restatement refers to the broader notion of “trade values,” but the usage is quickly narrowed. See *id.* § 38.

13. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (holding trade secrets protected by Takings Clause).

expand protection to individuals beyond that which they receive either from the law of trespass as it applies to land, or the law of misappropriation as it applies to trade names (which is itself a statutory creation). In each of these cases, I think that the best way to analyze the problem is looking from an ex ante perspective to see whether the creation of a new system of property rights expands the size of the overall social pie by providing all individuals with what I term implicit-in-kind compensation under the new intellectual property regime that offsets the loss of use of existing assets.¹⁴ It is not, of course, the case that Justice Pitney made an explicit reference to the more welfarist framework, which measures the soundness of legal rules in terms of their overall social consequences. Rather, it is that resort to this approach, I believe, best explains the creation and expansion of different forms of property rights. But it seems clear that his most distinctive contribution to this debate, the rise of "quasi-property" rights between direct competitors in the newsgathering business is very much in this tradition of thought.

To put the point most simply, what emendations to intellectual property law should be made to deal with this case of the misappropriation, broadly conceived, of the labor of one newsgathering association by the other? Justice Pitney at several places refers back to the agricultural metaphor—the INS could not properly appropriate the labor, skill, and money of the AP by "endeavoring to reap where it has not sown,"¹⁵—that both Adam Smith¹⁶ and William Blackstone¹⁷ used to explain why the onset of agriculture led to the creation of permanent rights in land that were of no value in a hunter-gatherer society. It is pointless to allow a sojourner today to keep out others in perpetuity when he had quit the land without any clear intention to return. Yet the exclusion right is worth ever so much more when those who clear the land to sow know that they will stay around to reap. At this point, the projection of property rights on the plane of time is needed to create the right incentives for initial investment, even at the cost of excluding others. The aggregate gains from higher production cannot be left on the table. There is, moreover, no way in which any potential investor in land is in any position to negotiate for exclusivity with all potential intruders. Nor is there any serious distributional issue if the same rights of exclusion are extended to all original possessors. Even the nonpossessors are in a far better position so long as they have the opportunity to trade with those who own agricultural land.

Justice Pitney's construction of quasi-property rights adapts that same logic to hot news. Justice Pitney's great achievement was to define a new species of property rights in two dimensions. The first dimension is directed

14. For discussion, see Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to Premature Obituary*, 62 *Stan. L. Rev.* 455 (2010); Richard A. Epstein, *Liberty versus Property? Cracks in the Foundation of Copyright Law*, 42 *San Diego L. Rev.* 1 (2005). My original development of this idea took place first in connection with nuisance law, in Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 *J. Legal Stud.* 49, 77–79 (1979), which then carried over to the takings law in Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

15. *Int'l News*, 248 U.S. at 239.

16. See generally Adam Smith, *Lectures on Jurisprudence* (1762).

17. 2 William Blackstone, *Commentaries* *7.

toward those who are excluded. It makes no sense whatsoever to say that the AP and its affiliate papers really want to exclude their paying customers from the use of the information that they wanted to supply. Thus, any rule that said that the AP would agree not to use the bulletin boards of its customers if they did not agree to use theirs, does not produce any long-run advantage for members of either group. Quite the opposite, that move is inconsistent with the entire economic logic of seeking to define property rights in ways that maximize the value of information (or any other resource) by reducing the transactional barriers to its effective utilization. But that deal—I will not poach on your information if you do not poach on mine—when applied to direct competitors is an effective way for both sides to avoid mutual economic suicide. The firm that has to share information that it has acquired with others will not collect it in the first place. That is the evident logic behind the major growth of trade secrets, and it explains why the general policy of government regulators is not to require, willy-nilly, those firms that submit information to government regulatory authorities to share their hard earned gains with their direct competitors, also seeking regulatory approval.¹⁸ The fragmentation of protection that Justice Pitney demands makes perfectly good sense.

Next, there is the temporal dimension. On this point, it is clear that the information's huge value to direct competitors lies only on the day it first appears on the bulletin board. The cycle of publication suggests that once a day goes by, the newspapers will be looking for a new batch of information. The previous day's news slips into the background, and that information is now available from countless other sources that have gotten it in the regular fashion from the AP, INS, or a thousand other sources that have repackaged that information in some useable form. Put these two facts together, and here is the final blow in favor of Justice Pitney's notion of quasi-property.

So limited to these two dimensions, the decision represents a real sophistication in the judicial delineation of property rights in a rather distinctive niche. To be sure, the legislature is always ready to cut back on these kinds of new rights. But in this case, what improvements could it possibly bring out? Indeed, the traditional history has actually gone the other way insofar as legislation often is obtained by people who could not get judicial recognition of a novel species of right in the first place. The efforts at judicial innovation have in many instances borne fruit as the legislature has done nothing to upset the rights in question. Indeed, in some cases, such as with the fashion designs that Judge Hand rejected in *Cheney Bros. v. Doris Silk Corp.*,¹⁹ the courts have shown evident hostility to *International News* by refusing to supply any common law protection for design patterns of short life and great value that did not fall within the strictures of either the patent or copyright laws.

When it came to the logic of *International News*, however, Judge Hand read the case as though it stood for no general principle at all, but only applied

18. For a discussion, see generally Richard A. Epstein, *The Constitutional Protection of Trade Secrets Under the Takings Clause*, 71 U. Chi. L. Rev. 57 (2004).

19. 35 F.2d 279 (1929).

to “printed news dispatches.”²⁰ In making that statement he further noted, as Balganesch observed, “there are cases where the occasion is at once the justification for, and the limit of, what is decided.”²¹ That sentence is fine as far as it goes, but it does not go far enough. The real question to ask was whether it was possible to fashion a remedy that applied only to direct competitors within a limited time period. *Cheney Bros.* offered that precise opportunity because the plaintiff only sought protection for a short-term fashion season of eight or nine months—and then only against direct competitors.²²

Why then not use the analogical method to see whether the common law rule that worked in the one case would work in the next? In response to this query, Judge Hand retreated to a broader institutional argument that recognizing these forms of protection could work at cross purposes with established bodies of patent and copyright law. But that institutional argument was no more decisive here than it was in *International News*, where it could have also been argued that so long as the case fell outside the parameters of the copyright law, the plaintiff had no protected interest. Yet this approach misses the reply that any common law rule, either way, sets up only a default that the Congress can alter given its unquestioned last word in this entire area. At this point, the proper question is—if we should think to borrow a phrase from the literature on preemption—whether Congress has occupied the field by its statutes. The type of short-term limited protection sought in *International News* seems far removed from the areas to which copyright protection had already extended. The single cycle involved in both cases gives a sharp temporal focus to a right that applies between the competitors. Judge Hand would have done better to have taken the plunge.

Indeed, the issue is once again before Congress on the question of whether some protection should be extended to new fashion styles that are pirated by knock-off competitors. There is a genuine need in these cases to walk the fine line between killing off all inspired work, on the one hand, and allowing for massive direct imitation by exact knock-offs, on the other. The bill currently working its way through the Senate features what resembles a common law rule, deeming a fashion design to have not been copied from a protected design if it “(1) is not substantially identical in overall visual appearance to and as to the original elements of a protected design; or (2) is the result of independent creation.”²³ Oddly enough, the protection for the single

20. *Id.* at 280.

21. *Id.*; see also Balganesch, *supra* note 1, at 495 n.321 (quoting same passage).

22. 35 F.2d at 279–80.

23. Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. § 2 (2010). Opposed to this legislation are Kal Raustiala and Christopher Sprigman, who argue that such protection is not necessary because the fashion industry has flourished under a regime of free and easy copying. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687, 1759 (2006) (noting any “first-mover” argument in favor of the current regime fails in part because “[f]or the last quarter-century (at a minimum) the copying of fashion designs has been easy and fast”). For the opposing point of view, see generally C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan. L. Rev. 1147 (2009). For my qualified support for the latter Hemphill-Suk position, see Richard A. Epstein, *Comment to Extending Intellectual Property*

season, which was sought in *Cheney Bros.*, may have afforded a better solution.²⁴ The big return on style comes in the initial year, which is worthy of protection. But once that time passes, the style seeps into the general culture, where it is far more costly to provide the protection to which the original designer has a far less distinct claim.

Even if *Cheney Bros.* were decided the opposite way, it would still remain the case that *International News* would, as a common law matter, give rise to some close borderline cases. One such case is Judge Ralph Winter's excellent opinion in the *National Basketball Ass'n v. Motorola, Inc.*,²⁵ where the question was whether *International News* allowed the NBA to enjoin Motorola from broadcasting a continuous feed about the progress of basketball games on its special paid network. The case clearly involves using information generated by another for one's own advantage, and there is at least some argument that greater exclusive rights to the NBA could be a larger inducement for entering into the basketball business in the first place. But that effect seems small at best, and is in any event a far cry from what should be illegal: tapping into the NBA feed itself for the collection of information. But, apart from that classic *International News* violation, it is rather difficult to think of any short period in which the information could not be rebroadcast, given the numerous outlets from which it could be provided. It is to my mind not all that clear that Motorola does not count as a direct rival to the NBA, which had its own reporting service. Nonetheless *International News* is distinguishable because Motorola's feeds were not simply lifted from the NBA ones. In conscious awareness, perhaps, of the reach of that decision, Motorola's reports were distilled from information about the game that was obtainable from multiple sources. The 1976 Copyright Act²⁶ did extend to the simultaneous reuse of broadcasted information, so the inference of occupation of the field seems stronger than it did in *International News*, which did not come close to the copyright materials. I am not as confident as Judge Winter as to the right result, but that is neither here nor there. The decision in *NBA* shows that the common law courts that created the basic doctrine of misappropriation are capable of placing principled limitations on it.

III. THE BALGANESH APPROACH

Turning at last to the Balganesh article, his tone often seems vaguely critical of Justice Pitney, and also, I might add, of the defense that I offered of Justice Pitney's opinion some twenty years ago.²⁷ But even with the advances

Protection to the Fashion Industry, (Feb. 25, 2011, 3:31 PM), at <http://ricochet.com/main-feed/Extending-Intellectual-Property-Protection-to-the-Fashion-Industry> (on file with the *Columbia Law Review*).

24. 35 F.2d at 279–80.

25. 105 F.3d 841 (2d Cir. 1997).

26. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810 (2006)).

27. See Balganesh, *supra* note 1, at 452–53 (arguing *International News* Court “summarily affirmed” lower court’s chosen remedy of injunctive relief “without any consideration at all”). The gist of the criticism is that I thought that I claimed that *International News* “did not answer the question of property in news,” which I thought Justice Pitney did by opting for the ingenious

in economic theory, it is no mean feat to improve upon the original Justice Pitney formulation. In order to carve out a position that builds on Justice Pitney’s insights but nonetheless departs from his own conceptual framework, Balganesch takes the position that Justice Pitney’s misappropriation theory is best understood as a hybrid between two traditional bodies of law: unfair competition and restitution.²⁸

I disagree. In fact, the distinctive features of Justice Pitney’s misappropriation theory owe nothing to either of these bodies of law. The common law of unfair competition draws upon two strands of the basic libertarian theory that deal with the prohibition against force and fraud, both of which extend the principle in a sensible fashion to transactions that involve three parties instead of two.

To back up for a moment, the standard two-party case of fraud involves a deceit that a defendant practices on the plaintiff, for which some remedy is given. One such remedy is that of restitution, where the defendant has to return the thing that he received from the plaintiff under certain contracts vitiated by mistake so long as the plaintiff returns to the defendant his proceeds from the transaction. Unraveling the transaction in this sense restores the status quo for both sides.²⁹ The use of the term restitution in this sense must be carefully distinguished from the use of restitution as a theory of liability, which typically depends on situations where the defendant receives some property from the plaintiff by mistake when the transaction was not intended as a gift. Overpayment of a bill creates the obligation to return the excess even though there was no promise to that effect—a rationale that is explicitly adopted as early as Gaius, in his *Institutes*.³⁰

The complexities with unfair competition arise in two three-party situations. In the first, which deals with “palming off” or, as the English say, “passing off,” the defendant represents that his inferior wares are really the superior wares of the plaintiff, in order to get the benefit of the plaintiff’s reputation and hard work.³¹ It is, in effect, an action intended to protect business good will.³² The action on deceit is, of course, routinely allowed to any individual purchaser anxious to recover the small sums he has lost. But

quasi-property solution and which Balganesch appears to recognize. See Balganesch, *supra* note 1, at 448 n.126 (quoting Epstein, *INS*, at 113–14).

28. See Balganesch, *supra* note 1, at 427 (“Misappropriation is thus a framework for recovery that draws on unfair competition and unjust enrichment law, an interface that has otherwise received little scholarly attention.”).

29. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 1, 46 *Yale L.J.* 52, 56 (1936) (“[I]f A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.”). For Fuller, the restitution interest meant that the party in breach had to return what he had received from the other side. That interest was more restricted than the reliance interest, which allowed the injured party to recover that sum which put him back to the same position before the contract was formed, and the expectation interest, which sought to allow the plaintiff to be put in the position he would have been in if the contract had been fully performed.

30. 3 Gaius, *Institutes of Roman Law* ¶ 91 (Edward Poste, trans., 4th ed. 1904) (c. 160 AD).

31. For the statutory protection, see the Lanham Act, 15 U.S.C. §§ 1051–1141 (2007), a trademark statute that covers the most important cases.

32. For discussion, see generally *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.*, [1979] AC 731 (H.L.) (appeal taken from Eng.).

the larger loss is to the plaintiff-seller from the diversion of trade, even though he is only the indirect victim of deceits practiced on others. The action is like a quasi-class action (on behalf of consumers), which puts the real party in interest in charge of the lawsuit. Restoration of lost profits is one remedy, though always hard to compute. The second is an injunction against further misconduct, which obviates the evidentiary problems.

Side by side with “palming off” is product disparagement, where the defendant fraudulently states that the plaintiff’s product is inferior to what it actually is, in order to make his own goods look more attractive.³³ This tactic tends to be restricted to highly concentrated markets, for otherwise the defendant who goes to the trouble to commit fraud finds that he drives the plaintiff’s customers into the arms of his competitors. But, either way, it is just not possible to expect small individual buyers to bring suit for the harms that they have suffered. The third party action allows for the same amalgamation of the claims in the hands of the right plaintiff, as in the “palming off” case.

Neither of these provides much of a model for the novel misappropriation theory of *International News*, because nothing in Justice Pitney’s formulation of quasi-property is intended to give new actions to bulwark the common law rules against force and fraud. To be sure, Justice Holmes did suggest in dissent that acknowledgment of source should end the difficulties in what he regarded as a more “subtle” and “indirect” form of palming off.³⁴ But what good would it do for the defendant’s members to publish a notice that some of their information came from the AP bulletin boards, which might have the odd effect of adding to their credibility? The key difference between these two cases and misappropriation is that the latter depends on a notion of mutually beneficial forced exchanges: Each side is told to give up its right to pick things off the other’s bulletin boards for the mutual advantage of both. No hard line libertarian theory can tolerate these forced Pareto efficient exchanges, which is why the decision in *International News* represents a quantum leap beyond the earlier cases that did fit into the force and fraud paradigm. Justice Pitney got the point intuitively. Neither Justices Holmes nor Brandeis grasped the point.

In this regard, we can see why restitution (as the fourth wheel of the coach)³⁵ bears a somewhat closer resemblance to the misappropriation theory. At its roots, restitution is also an exception to the standard libertarian view that the only sources of obligation are promises and tortious acts. Here the necessity of the situation creates the obligation, whereby one person is able to force an obligation on another person solely because he has provided that party with a benefit of equal or greater value in settings where high transactions cost block voluntary transactions.

Yet a moment’s reflection should show that ordinary restitution and *International News* involve very different forms of forced exchanges. The traditional common law restitution case envisions a plaintiff who imposes an

33. Restatement (Third) of Unfair Competition § 2 (1995).

34. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 247 (1918) (Holmes, J., dissenting) (“The falsehood is a little more subtle, the injury, a little more indirect . . .”).

35. See Balganesch, *supra* note 1, at 428 & n.37 (quoting Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. Cal. L. Rev. 1369, 1370–71 (1994)).

obligation on the defendant for benefits that the *plaintiff has supplied to the defendant*. As Balganesch notes, courts are normally chary about providing that relief precisely because it deprives the defendant of the power of choice in managing its own affairs.³⁶ It is to prevent this officious intermeddler that the high transaction costs condition is imposed. In other cases, the restitution remedy is invoked where the defendant is asked to return benefits that it took from the plaintiff. Restitution enters into the picture, if at all, only under the doctrine of election of remedies. It has long been held, for example, that if the *defendant* uses the plaintiff's underground passages to get his coal to the surface, the plaintiff may waive the tort and sue for damages in restitution that the defendant obtained by using those passages without permission.³⁷ This theory of damages intends to make sure that the defendant cannot profit by consciously violating the property rights of the plaintiff.

This second situation of the restitution remedy is quite remote from the cases in which restitution furnishes the basic cause of action. It is one thing for the defendant to be enriched by his own actions, and quite another to be enriched by the plaintiff's actions. The point becomes clear in this context if only because there is no sensible way in which the plaintiff in the typical restitution case can seek to enjoin the defendant from some future wrongful act. The only remedy on the table is that of damages for the benefit previously conferred under circumstances (e.g., mistake or necessity) where it is unjust for the defendant to keep it.

Yet note the difference. The plaintiff in *International News* surely could have sought injunctive relief in principle if the lifting of information from its bulletin boards was still ongoing, which it was not. It could have also asked, under its novel theory, for a disgorgement of profits as a remedy. But it could not find a violation under either the copyright law or any standard libertarian theory involving the use of force or fraud. Balganesch is right when he surmises that “Justice Pitney may have had a purpose in using [the term quasi-property]—especially since the term quasi-contract was for long thought to be connected to the general principle of unjust enrichment.”³⁸ The term shows that there is a self-conscious deviation from the typical use of property rights, without clearly explaining what that deviation is. It happened because the language of forced exchanges was, and today still often is, an unappreciated source of common law rights. But the use of the term “quasi” does not show that the *International News* misappropriation tort derives from any combination of the common law rules on unfair competition and restitution.

Balganesch also misfires when he seeks to link up *International News* with the collective action problem faced by newspapers in the newsgathering business. A collective action problem arises when a group of individuals

36. For the basic point, see Balganesch, *supra* note 1, at 464 n.197 (citing *Falcke v. Scottish Imperial Ins. Co.*, (1886) 34 Ch.D. 234 at 248 (Eng.) (“The general principle is . . . that work or labour done or money expended by one man to preserve or benefit the property of another do not . . . create any obligation to repay the expenditure.”)).

37. *Phillips v. Homfray*, [1883] 24 Ch.D. 439 at 462 (Eng.).

38. Balganesch, *supra* note 1, at 439.

acting alone are unable to achieve a result that they collectively desire.³⁹ The standard prisoner's dilemma game illustrates the power of the point by showing how each of two individuals, acting separately, has an incentive to confess when collectively they are better off not confessing. In ordinary life it reflects the market failures that arise when the voluntary contributions to support national defense or the construction of local roads will lead to their systematic underfunding, as each person seeks to free ride on the others. The need for many newspapers to gather information is obviously enough, and Balganesch is surely right to say that "forcing each newspaper to collect the news individually on its own was recognized to be wasteful, duplicative, and prohibitively expensive, for all but the largest incumbents."⁴⁰ But that is beside the point in this context. Any association with 950 or even 400 members faces an evident collective action problem. But this collective action was already solved long before this lawsuit began. Indeed, the very fact that this lawsuit takes place between two such associations means that they have already solved their collective action problems, such that the ultimate litigation operates on the same principles that would govern a dispute between two natural persons.

CONCLUSION

In sum, anyone who reads Balganesch's long and carefully written article must be impressed by his thoroughness and fair-mindedness. Yet at the same time, it is impossible to avoid a certain uneasiness about Balganesch's article because it is hard to figure out precisely whether it is an effort to modernize Justice Pitney's decision in *International News* or to discredit it. My own reading is that Balganesch is hardly dismissive of Justice Pitney and rather likes the elegance of his solution to the problem of hot news. Yet at the same time, he brings the wrong tools to the table to understand the case. Different tools of analysis that understand the role of forced exchanges in defining common law rights afford a surer path toward legitimating a decision that over the years has received far too much uninformed criticism. Justice Pitney's somewhat strange and off-putting terminology of quasi-property has this virtue: It offers a window into the inner logic of *International News Service v. Associated Press* that has withstood the test of time.

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39. See, e.g., Mancur Olson, *The Logic of Collective Action* 1–2 (1965) (noting "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*").

40. Balganesch, *supra* note 1, at 449.