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# The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law

Leo J. Raskind\*

It is anomalous that our legal system surrounds an economic order based on competitive markets, but lacks a comprehensive set of legal rules defining competitive behavior. In fact, the main body of law that relates to norms of market behavior of competitive rivals does so only tangentially, consisting of two elements: a series of statutes, such as the antitrust laws and the intellectual property statutes; and a body of case law derived from common law tort doctrines.

Given the specialized nature of the statutory law, the task of defining and controlling competitive norms has traditionally been relegated to the amorphous body of case law known as the "misappropriation" doctrine.<sup>1</sup> Analysis of this doctrine, however, reveals gaps in its analytical framework. For example, the doctrine contains no criteria derived from competition. This omission contrasts with intellectual property law cases in which courts invoke the misappropriation doctrine to remedy allegations of "piracy" or "dirty tricks," instead of relying on statutory principles to resolve the conflict.<sup>2</sup>

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1. The misappropriation doctrine "differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it [the seller] substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own." *International News Serv. v. Associated Press*, 248 U.S. 215, 242 (1918); *see also Gary Van Zeelant Talent, Inc., v. Sandas*, 84 Wis. 2d 202, 223, 267 N.W.2d 242, 251-52 (1978) (misappropriation doctrine does not protect consumer lists).

2. *See, e.g., Board of Trade v. Dow Jones & Co.*, 108 Ill. App. 3d 681, 688-97, 439 N.E.2d 526, 532-37 (1982) (under misappropriation doctrine proposed stock market indexing contract violated Dow Jones's proprietary rights in the

This Essay traces the development of the much-criticized misappropriation doctrine<sup>3</sup> and presents its analytical basis. Part I presents the nature of the problem. Part II analyzes the seminal opinion of *International News Service v. Associated Press*. Part III examines the relevant legal history and economics of the misappropriation doctrine. Part IV presents a revised analytical basis for the misappropriation doctrine that incorporates competitive principles, and suggests how a court might apply the proposed analysis to intellectual property cases.

In short, this Essay argues that when courts hear patent, copyright, and trademark cases in which statutory protection is inappropriate, but nonetheless the conduct of a party is characterized as "chiseling," "piracy," "unethical," or the like, they should begin their analysis by considering the competitive relationship from which the claim originates. The clear legislative expression of a preference for competition contained in federal antitrust laws warrants this approach.<sup>4</sup> Moreover, courts in these cases should recognize the Supreme Court's continued emphasis on the preemptive effect given federal legislation relating to competition.<sup>5</sup> Ancillary doctrines that impinge on competition, such as misappropriation, should be invoked sparingly. From this perspective, courts should consider allegedly "inappropriate" conduct as an element of behavior in a competitive market context; within that framework, courts should view such conduct as an element of cost that a seller, as a com-

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index); *Columbia Broadcasting Sys. v. Melody Recordings, Inc.*, 134 N.J. Super. 368, 381, 341 A.2d 348, 352 (1975) (applying misappropriation doctrine to the copying of recorded music, even though defendant complied with applicable copyright statutes); *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 173-87, 218 N.W.2d 705, 709-13 (1973) (applying doctrine to record piracy).

3. See *infra* note 36 and accompanying text.

4. The Sherman Act, 15 U.S.C. § 1 (1988), states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by both said punishments, in the discretion of the court.

Similarly, the Clayton Act promotes competition through prohibiting unfair trade practices with respect to: price setting, 15 U.S.C. § 13 (1988); agreements not to use the goods of competitors, 15 U.S.C. § 14 (1988); corporate acquisition of stock, 15 U.S.C. § 18 (1988); banking, 15 U.S.C. § 19 (1988); and common carriers, 15 U.S.C. § 20 (1988).

5. See *infra* note 67.

petitor, considers when determining how much of a particular product to offer. The details of these criteria are developed below.

## I

To the extent that the disparate body of statutory law relates to market behavior, it does so selectively. Taken together, these statutes do not set out the legal conditions for organizing a competitive market; nor do they address the limits of competitive rivalry within such markets. Overall, these statutes concern competition only as part of a larger legislative purpose. For example, the Sherman and Clayton Acts together express a legislative preference for competition.<sup>6</sup> They address the conduct of competitors, however, only with regard to selected aspects of business decisions. Section one of the Sherman Act bars collective and collusive action among sellers with regard to price determination, i.e., price-fixing.<sup>7</sup> Similarly, boycotts, tying arrangements, information sharing, merging, and monopolizing are proscribed conduct only in terms of these specific practices.<sup>8</sup>

Congress and courts have developed these categories of illegality as part of a larger legislative design to limit economic power and to protect consumer welfare.<sup>9</sup> The Federal Trade Commission Act,<sup>10</sup> which bars "unfair methods of competition," is an example of a legislative attempt to reinforce the curbing of abusive market practices by the use of an administrative agency.<sup>11</sup> Further examples can readily be identified. The Robinson-Patman Act,<sup>12</sup> amending section two of the Clayton Act to bar "discriminatory pricing," was intended to inhibit the emerging chain store movement of the 1930s from displacing

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6. See *supra* note 4.

7. 15 U.S.C. § 1 (1988).

8. See Clayton Act, 15 U.S.C. §§ 13-20 (1988) (price fixing, boycotts, merging, and information sharing); Sherman Act, 15 U.S.C. §§ 1-2 (1988) (tying arrangements and monopolizing).

9. There are different perceptions of the purposes of the antitrust laws. Compare 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 103 (1978) (multiple goals of maximizing consumer welfare, dispersing concentrations of wealth, limiting economic power and business size, and broadening entrepreneurial opportunities) with R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 6 (1978) (a single goal of promoting consumer welfare).

10. 15 U.S.C. §§ 41-77 (1988).

11. See G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 27-32 (1924). The Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1988), has been interpreted *in pari materia* with § 1 of the Sherman Act, 15 U.S.C. §§ 1-36 (1988). See *F.T.C. v. Keppel*, 291 U.S. 304, 310 (1934).

12. 15 U.S.C. §§ 13(a), 13(b), 21(a) (1988).

the small, independent grocer.<sup>13</sup> In the 1980s, concern about the world trading status of the United States led to the enactment of section 1677 of the Trade Act, a provision that bars foreign sales below certain cost norms, a practice known as "dumping."<sup>14</sup> Section 1677 focuses on the pricing decisions of foreign sellers as part of a larger plan to protect domestic enterprise from "unfair competition." In addition, various state statutes address pricing behavior, but frequently only as to the distribution of specific products deemed the subjects of special concern, such as statutes controlling the prices of cigarettes and alcohol.<sup>15</sup>

The only clearly comprehensive attempt to provide a general statement of the conditions of competition was in the National Industrial Recovery Act of 1933.<sup>16</sup> In attempting to

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13. See Gifford, *Assessing Secondary-Line Injury Under the Robinson-Patman Act: The Concept of 'Competitive' Advantage*, 44 GEO. WASH. L. REV. 48, 51 (1975).

14. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 1677 (1988).

15. See, e.g., MINN. STAT. §§ 325D.32, 325D.37, 325D.415 (1990) (controlling cigarette prices at wholesale); 340A.312(2) (1990) (controlling volume discounts on liquor); see also Cal. Unfair Practices Act, CAL. BUS. & PROF. CODE §§ 17026, 17043 (West 1987) (unlawful to sell product at less than cost for purpose of injuring competitors; applies to all transactions); Pennsylvania Unfair Sales Act, PA. STAT. ANN. tit. 73 §§ 212-13 (Purdon 1971) (unlawful to sell, or offer to sell, merchandise at less than cost with intent or result of diverting trade, injuring competitor or creating a monopoly in any line of commerce).

16. National Industrial Recovery Act of 1933, 15 U.S.C. §§ 703-712 (repealed 1935). Enacted by a special session of the Seventy-Third Congress, the measure was designed to address the entire economic and commercial system. In signing the measure into law in June of 1933, President Franklin Roosevelt stated: "History probably will regard the National Industrial Recovery Act as the most important and far reaching legislation ever enacted by the American Congress." M. GALLAGHER, GOVERNMENT RULES INDUSTRY 2 (1934).

The Act permitted the President to establish the National Recovery Administration to execute the legislative mandate. A central purpose of the Act was to provide Codes of Fair Competition. *Id.* at 5. The agency, with the voluntary assistance of industry and labor groups, adopted a code for virtually every economic activity. Twenty-two volumes contained comprehensive codes for activities ranging from the handkerchief industry to bankers, the compressed air industry, optical manufacturing industry, and the dramatic and musical theatre industry. For each industry a code was prepared by industry participants and approved by the agency to control wages, hours of labor, and terms of trade. The Code addressed every aspect of an industry. For example, in the Code entitled, "Legitimate Full Length Dramatic and Musical Theatrical Industry," there was a provision under Article XVI, Trade Practices, stating the agreement of employers that it was an unfair trade practice to assist in the release of any actor from the cast of a theatrical production in order to accept employment in motion pictures. 1 NRA CODES OF FAIR COMPETITION 90 (1933). Almost all of the Codes dealt in detail with trade practices, e.g., the

stimulate recovery from the Great Depression, Congress sought to bypass the antitrust laws by permitting rival sellers collectively to set price levels. Each industry group would promulgate Codes of Fair Competition. Congress anticipated that prices would rise and generate increased purchasing power.<sup>17</sup> This experiment, however, was short-lived, because the Act did not survive Supreme Court review.<sup>18</sup>

Like the antitrust laws and other related statutes, pieces of legal rules relating to selected aspects of the competitive process exist in the body of statutory law that protects intellectual property. These legal regimes, although designed to provide an incentive for creative effort by granting rights in patent,<sup>19</sup> copyright,<sup>20</sup> semiconductor chip,<sup>21</sup> trademark,<sup>22</sup> and trade secret law,<sup>23</sup> function also to affect conduct in the marketplace. Because the incentive mechanism in these statutes ultimately gives rise to a commercial transaction in which the owner of the intellectual property right receives the payment of a royalty or other transfer payment, the intellectual property laws coincide with the competitive process.<sup>24</sup>

Within each of these intellectual property regimes is a link to the competitive process. For example, when a court enjoins the reproduction and distribution of a defendant's plat map on a finding of copyright infringement, that defendant is effectively foreclosed from competing in the market with that product. Through its ancillary doctrines, the intellectual property system further involves the market process. Thus, a patentee may license another to exploit its patented invention, subject to the constraining doctrine of patent misuse. By preventing the

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Code of the Artificial Flower and Feather Industry provided for terms and discounts of sales transactions, the manner of returning merchandise, and barred consignment sales, gifts to buyers, advertising allowances, and the assignment of accounts receivable without NRA approval. *Id.* at 386.

17. National Industrial Recovery Act of 1933, 15 U.S.C. §§ 703-712 (repealed 1935).

18. In *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 537 (1935), the NIRA was held unconstitutional as an undue delegation of congressional power to the executive branch.

19. 35 U.S.C. §§ 1-293 (1988).

20. 17 U.S.C. §§ 101-810 (1988).

21. 17 U.S.C. §§ 901-914 (1988).

22. 15 U.S.C. §§ 1051-1157 (1988).

23. Trade secrets are protected under state statutes. Minnesota and 33 other states have enacted the Uniform Trade Secrets Act. See MINN. STAT. § 325C.01-08 (1990); Uniform Trade Secrets Act, 14 U.L.A. 433 (1990).

24. Besen & Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERSP. 3 (1991).

patentee from dictating to its licensee the selling price or other terms of trade in the resultant product, the doctrine bars the patentee from expanding the statutory right.<sup>25</sup>

Similarly, the copyright act has a "fair use" provision constraining a proprietor's ability to bar competing uses in terms of actual or potential competitive market effects.<sup>26</sup> Trademark protection also affects the competitive market process by restricting product designation and differentiation. Thus, a seller may not seek to attract customers by closely emulating the trademark of an established competitor.<sup>27</sup> In addition, state statutes provide trade secret protection permitting independent discovery of a secret method or process, but proscribing "misappropriation" by improper commercial conduct.<sup>28</sup>

Taken as a group, these statutes touch and concern various aspects of commercial rivalry, but they are not suited to serve as a basis for distinguishing "piracy" from competition. The reason is not difficult to discern. Because each of these statutes originated in response to a particular economic problem, each statute is confined to the relevant segment of market conduct that the statute and subsequent case law interpretations identify. Although the broader, case law doctrines of misappropriation and unfair competition could potentially address the

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25. See Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1855-64 (1984); Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. 265, 277-78 (1977).

26. 17 U.S.C. § 107 (1988). Among the factors that the Copyright Act directs a court to consider in applying the fair use defense is "the effect of the use upon the potential market for or the value of the copyrighted work." *Id.*; see also Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1662 n.4 (1988) (listing the four factors, enumerated in the Copyright Act of 1976, that courts have looked to in making fair use determinations: "(1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for and value of the copyrighted work." (quoting 17 U.S.C. § 107 (1976))); Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1603 (1982) (same).

27. Folsom & Teply, *Trademarked Generic Words*, 89 YALE L.J. 1323, 1333-34 (1980). See *Rite Aid Corp. v. Rite-Way Discount Corp.*, 508 F.2d 828, 830 (C.C.P.A. 1975).

28. The Uniform Trade Secrets Act of 1979 defines "misappropriation" in part, as follows: "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." Uniform Trade Secrets Act § 1(2)(i), 14 U.L.A. 438 (1990). See Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 691 (1980).

problem, they lack an analytical foundation congruent with the relevant competitive process. This Essay attempts to provide such a foundation.

## II

Originating in the famous *International News Service v. Associated Press* case,<sup>29</sup> the doctrines of misappropriation and unfair competition<sup>30</sup> are difficult to understand and apply. Unlike the statutes aimed at specific aspects of the competitive process, these doctrines lack a conceptual foundation. The statutes, at least, come with some legislative history to provide a context for interpretation. In addition, the statutory enactment often is related to a wider public debate. The Sherman Act, the depression-based legislation concerning price discrimination,<sup>31</sup> and fair trade legislation<sup>32</sup> are examples of such statutes. Similarly, the Clayton Act may be viewed as a congressional response to courts' initial narrow interpretation of the Sherman Act.<sup>33</sup>

In contrast, the broad doctrine of misappropriation originated in a judicial opinion involving a unique commercial "dirty trick" that raised an issue of first impression.<sup>34</sup> The traditional practice of adapting analogous principles failed to reveal relevant precedent. Accordingly, a majority opinion of the Supreme Court in *International News Service v. Associated Press* launched the misappropriation doctrine in an ad hoc fashion.<sup>35</sup> With two powerful reservations noted in concurrence and dissent, courts and commentators have since noted a lack of analytical content in the doctrine.<sup>36</sup> Despite such criticism, however, courts in intellectual property cases continue to rely

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29. 248 U.S. 215 (1918).

30. *Id.* at 239-40.

31. Robinson-Patman Act, 15 U.S.C. § 13(a) (1988).

32. National Industrial Recovery Act of 1933, 15 U.S.C. §§ 703-712 (repealed 1935).

33. G. HENDERSON, *supra* note 11, at 16.

34. See *infra* notes 41-53 and accompanying text (discussing the *INS* case).

35. 248 U.S. 215 (1918).

36. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 513-15; Baird, *Common Law Intellectual Property and the Legacy of INS v. AP*, 50 U. CHI. L. REV. 411, 413-15 (1983); Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?*, 33 MICH. L. REV. 321, 331-32 (1935); Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 190-92 (1936); Rahl, *The Right to 'Appropriate' Trade Values*, 23 OHIO ST. L.J. 56, 57 (1962); Rogers, *Unfair Competition*, 17 MICH. L. REV. 490, 491-93 (1919); Stern & Hoffman, *Public In-*



on misappropriation as a basis of decision.<sup>37</sup> Some courts and commentators even urge expansion of misappropriation analysis.<sup>38</sup> Because of the doctrine's wide usage, it is appropriate to attempt to refine it.

This Essay asserts that the concept of misappropriation can be refined and restated in terms congruent with competitive norms. James Rahl provided a beginning for such an exercise when he wrote of the misappropriation doctrine: "[T]here is a valid role [for it] . . . that is to protect trade values against copying of a sort which will cause their destruction or their frustration."<sup>39</sup> In this sense, the doctrine can serve as a barrier against competitive behavior that reduces the supply of a given product to the detriment of social welfare.<sup>40</sup> But, the doctrine must be adapted to the competitive process; such adjustment is required because, in announcing the misappropriation doctrine, the court did not craft its opinion in terms of economic analysis.

*International News Service v. Associated Press*<sup>41</sup> is sufficiently familiar to warrant no more than a cursory review of its facts. In 1915, military censors barred the International News Service (INS), an organization engaged in the gathering and publishing of news, from direct access to European news sources of military operations on the Western Front. The INS

*jury and Public Interest: Secondary Meaning in the Law of Unfair Competition*, 110 U. PA. L. REV. 935, 940-42 (1962).

Judge Learned Hand repeatedly rejected the misappropriation doctrine and the case that announced it, urging that *INS v. AP* be confined to its facts, because it lacked analytical underpinnings. As he saw it, "it cannot be used as a cover to prevent competitors from ever appropriating the results of the industry, skill, and expense of others." *R.C.A. Mfg. Co. v. Whiteman*, 114 F.2d 86, 90 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940). *See also* *G. Ricordi v. Haendler*, 194 F.2d 914, 916 (2d Cir. 1952) (*INS* decision is to be strictly confined to its facts); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 603 (2d Cir. 1951) (unwilling to apply misappropriation doctrine in absence of copyright); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (*INS* not intended to establish a general doctrine), *cert. denied*, 281 U.S. 728 (1930).

37. *See supra* note 2.

38. *Carpenter v. United States*, 484 U.S. 19, 27 (1987); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 532 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). *See also* Sell, *The Doctrine of Misappropriation In Unfair Competition*, 11 VAND. L. REV. 483, 496-99 (1958) (misappropriation doctrine furthers value of free competition).

39. *See Rahl, supra* note 36, at 73.

40. *See, e.g.*, O. WILLIAMSON, *MARKETS AND HIERARCHIES* 211 (1975) (citing an example of a dominant firm causing misallocation of resources by restricting output).

41. 248 U.S. 215 (1918).

then began a course of conduct calculated to use the work of its competitor news-gathering association, the Associated Press (AP). This conduct consisted of three acts: It bribed AP employees to disclose AP news prior to, or contemporaneously with, dissemination to its members;<sup>42</sup> it induced AP member-newspapers to disclose news from the association to INS in direct violation of association by-laws;<sup>43</sup> and, it made unauthorized copies of association news stories from bulletin boards and from earlier published editions of association newspapers, reprinting the purloined stories without attribution in its own newspapers on the west coast.<sup>44</sup> Associated Press sought injunctive relief against all three acts, but the trial court enjoined only the first two. On appeal, AP argued that, without enjoining the third act, the relief was ineffective; the appellate court agreed, employing the misappropriation rationale to enjoin the copying of uncopyrighted matter.<sup>45</sup> Prior to this decision, the idea that unprotected material was in the public domain and could be copied freely, without recourse to an alternative mode of protection such as unfair competition, had been accepted as a hornbook maxim of copyright law.<sup>46</sup>

At the outset, the majority opinion announced its novel approach, noting that "we need spend no time . . . upon the general question of . . . [protection] in news matter . . . since it seems to us the case must turn on the question of unfair competition in business."<sup>47</sup>

Finding no direct authority to support its view of unfair competition in these circumstances, the majority improvised one from the trademark cases. In trademark cases, however, the phrase "unfair competition" had come to mean passing-off on the consumer the goods or services of one seller as those of a competing rival.<sup>48</sup> Thus, the doctrine of unfair competition, as developed in earlier cases, had no direct application to this case

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42. *Id.* at 231.

43. *Id.*

44. *Id.*

45. *Associated Press v. International News Serv.*, 245 F. 244, 253 (2d Cir. 1917), *aff'd*, 248 U.S. 215 (1918).

46. *Chicago Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 252 (1905) (transmission of exchange quotations enjoined only on the basis of inducing breach of contract). *See also* *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294, 296 (1902) (matter gathered and transmitted by telegraph company is not copyrightable).

47. *INS*, 248 U.S. at 236.

48. 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 1.7 (2d ed. 1984).

because INS sold the purloined word order exclusively in its own newspapers as its own product.

Consequently, in adapting the passing-off analysis to this case, the court emphasized unfairness rather than competition, thereby announcing a maxim of competitive ethics. The majority opinion states: "[T]he right to acquire property by *honest* labor or the conduct of a *lawful* business is as much entitled to protection as the right to guard property already acquired. . . . It is this right that furnishes the basis of the jurisdiction . . . of unfair competition."<sup>49</sup>

Characterizing AP's right as a "quasi-property" interest in its gathered news, the court provided the rationale for which it is most often cited, namely that

the labor, costs, and skill of a competitor may be protected from certain competitive conduct of its market rival. . . . [T]he defendant . . . admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money . . . and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown.<sup>50</sup>

Both the dissent of Justice Brandeis and the concurrence of Justice Holmes identify the flaws in the majority opinion's analysis. Justice Brandeis pointed out that the "quasi-property" characterization was inappropriate because expenditures do not necessarily create property rights. Brandeis stated, "the fact that a product . . . has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property."<sup>51</sup> His major objection anticipated the substantial critical literature that this case evoked. He pointed out that the competitive relationship of the parties was central to the case, noting that the actions of INS "may be inconsistent with a finer sense of propriety . . . [but] competition is not unfair in a legal sense merely because the profits gained are unearned, even if made at the expense of a rival."<sup>52</sup>

Justice Holmes succinctly rejected the majority's premise that AP has a protectable interest in its news, noting that "property, a creation of law, does not arise from value, although exchangeable."<sup>53</sup> Thus, by rejecting the "quasi-property" rationale of the majority, Justice Holmes rejected the premise

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49. *International News Serv.*, 248 U.S. at 236-37 (emphasis added).

50. *Id.* at 239-40.

51. *Id.* at 250 (Brandeis, J., dissenting).

52. *Id.* at 257-59 (Brandeis, J., dissenting).

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

that a property interest exists in news simply because news was sold (exchanged) for money (value).

Justice Holmes, however, joined the majority, urging in his concurrence that the competitive relationship of the parties be taken into account by requiring INS to credit AP as the source of the news. Absent attribution by INS, Justice Holmes would have enjoined INS's publication of AP news on the west coast during the time differential between the regions. Thus, over the protest of two powerful voices, the majority announced a rule involving competitors that was inconsistent with the process of market competition.

The tort doctrine of passing-off, from which the *INS* majority drew its theory of misappropriation, relates to an entirely different aspect of competition. Passing-off and its successor doctrine, trademark protection, attach to the entrepreneurial decision of whether to market a new product. Trademark protection governs the conduct of rivals in designing and presenting their products and services in the market. Trademark law establishes a competitive norm — no deception of consumers by falsely identifying the source of products. Hence, close copying of trademarks and trade dress is unlawful if the similarity would mislead consumers about the identity of the actual seller.<sup>54</sup> Similarly, tort doctrines of product disparagement form a standard of conduct for sellers attempting to attract customers.<sup>55</sup> From the seller's perspective, the decision is a marketing one: how to designate the product to appeal to customers. The seller makes this decision only after it has decided to sell a particular product — in the *INS* case, news.

As derived from the *INS* majority opinion, misappropriation is a doctrine out of step with the underlying decisional process of a competitor. As a business decision, INS took AP news in order to have a saleable product. This decision did not concern marketing; rather, it concerned the selection of the product to be marketed. This distinction is significant because it reveals that INS management did not consider the need to appeal to buyers when it decided to enter the market as a seller of news. To be sure, the prospective market entrant considers the existence of potential customers, but that consideration is part of the calculation of expected revenue. Moreover, the

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54. *Venetianaire Corp. of Am. v. A & P Import Co.*, 302 F. Supp. 156, 158 (S.D.N.Y. 1969), *aff'd*, 429 F.2d 1079 (2d Cir. 1970).

55. See Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1988); *U-Haul Int'l v. Jartran, Inc.*, 601 F. Supp. 1140, 1149-50 (D. Ariz. 1984).

market entrant decides how to designate the product — by trademark or otherwise — only later in the decisional process. Accordingly, by relying on the legal doctrine of passing-off as the basis for the misappropriation doctrine, the *INS* majority failed to illuminate the proper relationship between *INS* and *AP* as rival sellers of the *same* product.<sup>56</sup>

When one analyzes the conduct of *INS* from the perspective of an entrepreneurial decisionmaker in a competitive market, two analytical consequences follow. As Justice Brandeis noted in his dissent, the ethical characterization lapses because competition is synonymous with rivalry.<sup>57</sup> Moreover, *INS*'s conduct is revealed as that of a seller making the cost/revenue calculus associated with acquiring a product with which to compete. Viewing the actions of *INS* in the context of competition as a process, *INS* behaved as an entrepreneur seeking to minimize the cost of a basic input of its final product. When military censors barred *INS* from access to news about events on the Western Front, they also deprived *INS* of a basic input of its final product. In these circumstances, the decision to bribe and to copy as a means of obtaining war news can be characterized as a rational economic, cost-minimizing decision.<sup>58</sup> *INS* responded to a sudden escalation in the cost of a raw material by finding a lower cost substitute in the uncopyrighted literary material of a competitor. Putting aside the extra-legal issue of commercial ethics, the taking of *AP* news was essentially a competitor's decision on the cost side of its economic equation. In this context, the case raises the competitive issue of the extent to which a competitor may lawfully enter the market arena without incurring the same cost structure as a rival.

Introducing the concept of "quasi-property" diverts the inquiry. The defect in the majority opinion is that it relies on a legal doctrine relating to the marketing side of competition and cloaks that doctrine with the status of property. The majority then sought to provide an analysis of a taking of an undefined

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56. As noted above, the passing-off doctrine is concerned with maintaining the proper marketing relationships between competitors, not with establishing competitive norms to apply when a market entrant produces a product to market. In this case, *INS* was neither undertaking to steal *AP* customers nor to confuse them as to the source of the news. Instead, it sought to offer the same product without incurring the same costs of production, presumably in the belief that although not "nice," taking *AP* uncopyrighted news was lawful. *INS*, 248 U.S. at 217-18.

57. See *supra* text accompanying note 51.

58. Alchian, *Costs and Outputs*, in *THE ALLOCATION OF ECONOMIC RESOURCES* 23, 39 (A. Abramovitz ed. 1959).

property interest in the context of a competitive market in which taking is the very nature of the relationship. The fundamental difficulty that the majority faced was the absence of common law precedent treating the cost side of competitive rivalry. Cost-incurring and cost-saving is, however, an essential aspect of market competition. Costs in relation to anticipated revenue determine how much of a product a firm is willing to supply.<sup>59</sup> Further, by definition competition involves offering consumers alternative products, developed by different methods that combine ingredients differently, to be sold at competitive prices. These aspects directly relate to the costs that the enterprise incurs and ultimately to the price and output of that seller. When applying the misappropriation doctrine, however, the *INS* majority failed completely to distinguish these two different aspects of a seller's decisional process — the product development side and the marketing side.

Justice Holmes perceived that the passing-off doctrine applied only to product identification and that this aspect of the competitive process was not involved in the *INS* case. He noted that passing-off and product disparagement relate to the selling or customer appeal aspect of competition, not to the cost of input side.<sup>60</sup> To Justice Holmes, the fact that fresh news was gathered at great expense did not cloak uncopyrighted news with the attributes of property: "[I]n my view, the only ground of complaint that can be recognized without legislation is the implied misstatement [as to the source]. . . . [A] suitable acknowledgement of the source is all that the plaintiff can require."<sup>61</sup> Without expressly distinguishing between the input cost and customer appeal aspects of competition, Justice Holmes recognized that the majority's passing-off analysis could not be extended to the issue in the case. By omitting any

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59. It should be noted that the cost decisions relate only to the supply side of the market. The final selling price is determined by the interaction with the demand side. The present depressed state of the market for office space in the major cities illustrates this point. When the decision to build most of these high-rise office buildings was made, the market price for such space was at a level which promised a high rate of after-tax return. Before 1986, the federal income tax law dealt favorably with such assets. By the time these multi-year construction projects were completed, the demand conditions and the tax laws had changed. For present purposes, the cost calculation in relation to anticipated net revenues determined the supply of office buildings; ultimately the demand conditions determined the market price of the office space. See P. SAMUELSON, *ECONOMICS* 361-75, 436 (7th ed. 1967).

60. *International News Serv. v. Associated Press*, 248 U.S. 215, 246-47 (1918).

61. *Id.* at 248 (Holmes, J., concurring).

judgment of the ethical quality of the conduct of INS management, Justice Holmes properly identified the essential competitive rivalry between the parties and recognized the marketing role of traditional passing-off analysis in the competitive process.

In his lengthy dissent, Justice Brandeis made copious citations to copyright, trade secret, and unfair competition cases, including the English authorities. Curiously, he did not draw on the line of English cases that had begun to address the competitive cost issue raised in the *INS* case. In one of these cases, *Mogul Steamship Co. v. McGregor Gow & Co.*,<sup>62</sup> the plaintiff sought relief against an industry cartel that had excluded it from membership and resulting favorable trade terms.<sup>63</sup> In holding for the defendants, Lord Justice Bowen considered the legal limits of competitive conduct as follows:

No . . . trader . . . can . . . justify damaging another in his commercial business by fraud or misrepresentation, [i]ntimidation, obstruction, . . . molestation, intentional procurement of a violation of individual rights, . . . [t]he intentional driving away of customers by . . . violence . . . [or] inducing persons . . . to break their contracts. . . [T]here was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire . . . freights of the ports. [To hold this illegal] . . . would be to convert into an illegal motive the instinct of self-advancement . . . which is the very incentive to all trade.<sup>64</sup>

The *Mogul Steamship* court identified the inability of tort doctrines to reach all aspects of the competitive process. The opinion properly located passing-off and product disparagement as dealing with the relationship of traders to customers; the court avoided thrusting these doctrines into the decisional process of entrepreneurs involving costs, prices, output, and market shares.

In contrast, when announcing that a taking without a prior expenditure violated a norm of competitive fairness, the *INS* majority introduced an analytical formulation concerning the market relationship between seller and customer into the cost input side of the competitive process. From this perspective,

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62. 23 Q.B.D. 598 (1889).

63. *Id.* at 598-600.

64. *Id.* at 614-15. See also *Quinn v. Leatham*, [1900-3] All E.R. Rep. 1 (1901) (person has right to earn a living in her own way as long as she does not violate the law or interfere with legal rights of others); *Allen v. Flood*, [1895-9] All E.R. Rep. 52 (1898) (representative of trade union did not act unlawfully in doing a lawful act with a bad motive — threatening an employer with a strike if employer refused to terminate a particular employee — where there existed no contractual right to employment).

the majority moved into the most dynamic aspect of the competitive process — the input cost side, invoking a precedent that incorporates a legal norm from the marketing, customer appeal side — a quite different aspect of competition. Thus, the Court mismatched analytically the misappropriation doctrine with the aspect of competition before it.

### III

The traditional maxim that nature abhors a vacuum might be adopted as a legal maxim, stating that a vacuum in the law will always be filled by divergent analysis. A possible corollary might be that whenever courts recede to horticultural metaphors, there is underlying confusion.<sup>65</sup> The misappropriation doctrine illustrates both versions. Subsequent courts and commentators have supplied various theories for this broad doctrine in an effort to erect a working rationale for the misappropriation doctrine. Aside from Rahl's reference to market conditions, the bulk of the suggestions for reform lie along restitutionary lines.<sup>66</sup> In addition, despite the Supreme Court's repeated application of the federal preemption doctrine to limit state law intrusion into issues of competition in the national economy, courts continue to use the misappropriation doctrine.<sup>67</sup> Accordingly, the continued popularity of the doctrine

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65. For an example of this principle in federal income taxation, see Lyon & Eustice, *Assignment of Income: The Fruit and the Tree as Irrigated by P.G. Lake*, 17 TAX L. REV. 293, 295 (1962).

66. Rahl, *supra* note 36, at 69-76. *But see* Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1416-18 (1974) (arguing that those who pursue their own self-interest should not be allowed to recover in restitution from others who incidentally benefit); *see also* Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1019 n. 41 (1990).

67. Federal preemption was invoked in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232-33 (1964), and in *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234, 237-38 (1964), to strike down a state statute barring copying of unpatented subject matter. The principle was recently repeated in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146-57 (1989), in which a state statute barring copying of unprotected material by a special process was invalidated. *See Note, Copyright Protection For Factual Compilations — Reviving the Misappropriation Doctrine*, 56 FORDHAM L. REV. 933, 949-50, 952 (1988).

In addition to application of misappropriation analysis in cases involving news taken by a competitor news organization, for example, *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*, 411 Pa. 383, 390-94, 192 A.2d 657, 663-64 (1963), it has been invoked in cases of record piracy, such as *A & M Records v. M.V.C. Distrib. Corp.*, 574 F.2d 312, 314 (6th Cir. 1978). More recently, the doctrine has been applied in cases involving protection of stock indices. *Standard & Poor's Corp. v. Commodity Exchange, Inc.*, 683 F.2d 704,



with courts and commentators, coupled with its present lack of a working rationale, justifies yet one more attempt to reform the misappropriation doctrine. This task of refining the doctrine might begin with a fragment of relevant legal history and economics to place the misappropriation doctrine in a competitive market context. A useful starting point is the origin of a market economy.

Even before the emergence of a market economy in feudal England, the Crown applied legal constraints to the structure of markets and to the behavior of their participants.<sup>68</sup> In those times the right to engage in trading required the exercise of the royal prerogative. Historians note that, as the English kings began to grant the right to conduct a market or fair, they coupled that right with authority to control its organization as well as the conduct of its traders. For example, Edward III granted the Bishop of Winchester rights to the fair of St. Giles with all its rents and "rights of jurisdiction."<sup>69</sup> This practice culminated in the sixteenth century, as evidenced by records of routine royal grants in which the right to conduct a fair was coupled with jurisdiction to hold court for the administration of market law.<sup>70</sup> The subject matter jurisdiction of these courts was limited initially to debt and contract claims arising from dealings during that fair, including the power to enforce breaches of the "just prices" for staples, such as bread and beer. The subsequent parliamentary statutes against "forestalling" (buying from sellers before they got to market), "engrossing" (buying in bulk to increase the price), and "regrating" (buying to resell), reflected a continuing concern for the conduct of sellers at these fairs.<sup>71</sup> Legal limitations on the behavior of competitors emerged from

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710-12 (2d Cir. 1982); Board of Trade v. Dow Jones & Co., 98 Ill. 2d 109, 121-22, 456 N.E.2d 84, 90 (1983). The doctrine was invoked, but not applied in United States Golf Ass'n v. St. Andrews Systems, 749 F.2d 1028, 1034-41 (3d Cir. 1984).

Some commentators see the doctrine as the implicit framework of decision in recent copyright cases such as Williams v. Arndt, 626 F. Supp. 571, 581-82 (D. Mass. 1985), and West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1223 (8th Cir. 1986). See Reback & Hayes, *Copyright Gone Astray: The Misappropriation Alternative*, 3 COMPUTER LAW., Apr. 1986, at 1, 2-4.

68. Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905, 905-06 (1926).

69. Gross, *The Court of Piepowder*, 20 Q. J. ECON. 231, 234 (1906).

70. *Id.* at 235. The courts became known as the court of piepowder because the parties appearing were merchants whose feet bore dust from the outdoor markets. The Latin, *pede pulverosi*, gave way to the label, piepoudres, which became piepowder in English.

71. An Act Against Regrators, Forestallers & Engrossers, 1552, 5 & 6 Edw. VI ch. 14.

these cases, including decisions restricting agreements to refrain from practicing a trade.<sup>72</sup>

As simpler trading practices at the fairs, often characterized by barter, yielded to the more sophisticated channels of distribution that the communication and transportation advances of the Industrial Revolution made possible, the common law antecedents were adapted and extended.<sup>73</sup> These early legal constraints, however, were not extended to the market economy of the eighteenth century. Instead, the eighteenth century marked the advent of advocacy of a new economic order in which the "hidden hand" of private initiative would generate the optimum social welfare, while the role of the state would be reduced to providing essential public services. Accordingly, Adam Smith rejected the need for legislation controlling markets. He characterized the belief in the efficacy of the forestalling, regrating, and engrossing statutes as being akin to the popular belief in witchcraft.<sup>74</sup> In his exposition of a system of private initiative for public benefit, Smith described both competitive and collusive conduct in markets, providing many examples derived from his direct observation.<sup>75</sup> His analysis contained policy proscriptions against collusive conduct and deceitful market conduct, but overall his magisterial treatise tended to emphasize private, rather than governmental, initiative.

As the new economic order associated with Adam Smith became a political reality, the concept of free, unregulated markets became dominant: such was the power of Smith's analysis. He inveighed against any intrusion of governmental regulation into the workings of the marketplace. Consequently, Parliament repealed the statutes against forestalling, regrating, and engrossing.<sup>76</sup> The role of legal controls was to be limited to the peripheral functions of markets, modulating the competitive

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72. Case of John Dyer Y.B., 2 Hen. V, 5, pl. 26 (1414). These early cases became the foundation of the contract doctrine governing the enforceability of covenants not to compete. That contract doctrine became, in turn, the basis of the Sherman Act's reference to restraints of trade. See W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 18-19 (1980).

73. E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 7 (4th ed. 1989) (noting the "intrusion of tort law into the marketplace").

74. 2 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS Book IV, chap. IV (Rogers ed. 1880) (1st ed. 1776).

75. 1 A. SMITH, *supra* note 74, at 86.

76. An Act for Repealing Several Laws therein Mentioned Against Badgers, Engrossers, Forestallers, and Regrators, 1772, 12 Geo. III ch. 71.

rigor of traders in dealing with their customers and with each other. In place of regulatory statutes, tort doctrines and such ancillary principles as fraud, misrepresentation, interference with contractual relationships, and product disparagement were applied to regulate trading relations.<sup>77</sup>

In contrast, Smith's methodology was to theorize from facts. Smith drew his characterization of competition from his own observations and experience. As he theorized about the competitive process, he derived some general principles that he deemed essential to competition. For example, he found that rivals act independently for the most part, rather than collusively, and that each rival possesses reasonable knowledge of alternative market opportunities.<sup>78</sup> From his incisive descriptions of collusive conduct and other facets of competition, courts and legislators might have shaped the emerging tort doctrines in terms more closely linked to the competitive process.

Ironically, the wide acceptance of Smith's economic doctrines led to the diminished interest of economists in the practical working of actual markets, because the economists who followed Smith rejected his interest in actual markets.<sup>79</sup> As a leading contemporary economist has characterized this phase of the history of economic thought, "'competition' entered economics from common discourse, and for a long time it connoted only the independent rivalry of two or more persons."<sup>80</sup> Consequently, the writings of economists underwent a methodological change in which analysis of competition was expressed in terms of abstract modelling.<sup>81</sup> Viewing the process of competi-

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77. As tort doctrines relating to competition were refined, courts and commentators recognized an area of competition in which tort principles would not apply. The Restatement of Torts provides for liability for "engaging in a business primarily for the purpose of causing loss of business to another and with the intention of terminating the business." RESTATEMENT OF TORTS § 709 (1938).

This rule codifies cases like *Tuttle v. Buck*, 107 Minn. 145, 151, 119 N.W. 946, 948 (1909), in which a local banker sought vengeance rather than profit by engaging in the barbering business. The Restatement, however, would impose no liability for losses imposed upon a competitor when they arise from engaging in business in "good faith." RESTATEMENT OF TORTS, § 709 caveat (1938).

78. 1 A. SMITH, *supra* note 75, at 86-89.

79. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1, 1-3 (1957). See also Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1022-25 (1989) (arguing that the relationship between the Sherman Act and the common law is difficult to understand because the common law of competition was changing rapidly at the time the Act was passed).

80. Jones, *supra* note 68, at 905-06.

81. For example, by 1838, economic analysis had produced a mathemati-

tion in abstract, formal terms, economists insulated their analysis from concern with the behavior of traders in the marketplace. As refined, mathematically expressed analysis became the mode of economic reasoning; the earlier concern with the behavior of traders in actual markets lapsed. The behavioral content of competition was limited to the formal assumptions that the model required; observations of conduct of actual traders remained outside the analysis. One commentator characterized this facet of the economic theory of competition as follows:

There is a striking contrast in [the] economic literature between the analytical rigor and precision of competition . . . and the ambiguity surrounding the idea of competition whenever it is discussed in behavioral terms. . . . [A] concept of economic competition, if it is to be significant for economic policy, ought to relate to patterns of business behavior . . . . That was the case with the competition which Adam Smith made the central organizing principle in the *Wealth of Nations*.<sup>82</sup>

The analysis of competition continued as an analytical rather than a policy-oriented approach until the 1930s, when the Great Depression thrust upon economists the task of explaining the collapse of a market economy. This response was twofold. On the theoretical side, Edward Chamberlin in the United States and Joan Robinson in England modified the conventional structural elements of competition theory.<sup>83</sup> Before their work, the theory of competition took account of only two theoretical market constructs: perfect competition and monopoly.<sup>84</sup> Starting from different perspectives, Chamberlin and Robinson each provided a theoretical model capable of explaining the real world organization of markets that were a mixture of competition and monopoly.<sup>85</sup> From their contributions, it became possible to explain, in theoretical terms, such actual market behavior as using brand names and trademarks, advertising, and price-cutting. In Chamberlin and Robinson's writings the use of brand names and trademarks became part of the process

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cally expressed definition of perfect competition. Moore, *Paradoxes of Competition*, 20 Q. J. ECON. 211, 220-27 (1906). Moore credits Cournot with the first formal statement of perfect competition. *Id.* at 213.

82. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q. J. ECON. 639, 640 (1968).

83. E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933); J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933).

84. E. CHAMBERLIN, *supra* note 83, at 3; J. ROBINSON, *supra* note 83, at 3.

85. For example, their work added the phrases "monopolistic competition" and "imperfect competition" to the economic vocabulary. E. CHAMBERLIN, *supra* note 83; J. ROBINSON, *supra* note 83.

of product differentiation in which a seller sought to modify a segment of the demand curve for a product by advertising the product and by making the product distinctive in name, color, or appearance.<sup>86</sup> Although these developments returned the attention of some economists to the working of actual markets and to the decisional process of sellers, common law doctrines isolated from economic analysis had already shaped the notion of competition. Thus, cost, pricing, and output decisions remained the domain of abstract economic analysis.<sup>87</sup>

In addition to the theoretical changes, the Depression prompted the Roosevelt Administration to hire economists to make empirical studies of the structure and behavior of actual markets.<sup>88</sup> From this combination of theoretical and empirical initiatives, a new branch of economics emerged, a body of applied economics called "industrial organization."<sup>89</sup> A leading industrial organization scholar describes the difference between theoretical microeconomic analysis and industrial organization economics: "The pure microeconomic theorist thrives on simplicity and rigor; he is happiest when he can strip his model to the barest few essential assumptions and variables. The industrial organization economist is more inclined toward explanations rich in both quantitative and institutional detail."<sup>90</sup> Industrial organization economics differs from microeconomics in two other respects: Industrial organization entails studying in detail actual firms and industries from a historical, institutional, and theoretical perspective,<sup>91</sup> and it is concerned with

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86. See J. DUESENBERY, *INCOME, SAVING, AND THE THEORY OF CONSUMER BEHAVIOR* 6-17 (1949); Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1168-75 (1948).

87. It is only recently that these decisions have been related to legal analysis. See, e.g., Landes & Posner, *Trademark Law: An Economic Perspective*, 30 *J. L. & ECON.* 265, 265-66 (1987) (concluding that trademark law, as a derivative of tort law in general, can best be explained on the hypothesis that the law is trying to promote economic efficiency).

88. See, e.g., Fetter, *The Fundamental Principle of Efficiency in Mass Production*, in *RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED, AND SMALL BUSINESS* 398 (TNEC Monograph No. 13, 1936) (discussing the relation of efficiency to business size); see also G. MEANS, *INDUSTRIAL PRICES AND THEIR INFLEXIBILITY*, S. DOC. NO. 13, 74th Cong., 1st Sess. 9-19 (1935) (depression era study of differences in agricultural and industrial prices); Means, *Notes On Inflexible Prices*, 26 *AM. ECON. REV.* 23, 23-25 (Supp. 1936) (study of effects of inflexible pricing).

89. F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 2 (1970); W. SHEPHERD, *MARKET POWER & ECONOMIC WELFARE* 11-23 (1970).

90. F. SCHERER, *supra* note 89, at 2.

91. See, e.g., W. ADAMS, *THE STRUCTURE OF AMERICAN INDUSTRY* (4th ed.

improving or adjusting market processes through government intervention. The second feature has generated commentary on legislation and judicial opinions involving market processes, particularly in antitrust law — the closest point of tangency between law and economics.<sup>92</sup>

These references to economic history and to the history of economic thought suggest that examining the literature of industrial organization and related writings best serves the quest to derive economic criteria with which to refine the vague doctrine of misappropriation in competitive terms. This industrial organization literature has concerned itself with the decisional behavior of traders in respect to cost, price, output, and market share.

The development in the United States of laws dealing with market behavior buttresses this conclusion. During the 1880s, when economic analysis emphasized the development of an abstract model of perfect competition, the market conduct of large, aggressive corporations, such as Standard Oil Company, energized the political process.<sup>93</sup> The then dominant agrarian sector of the economy demanded redress for such practices as cutthroat pricing, secret rebates from railroads, a rapid merger movement, and harsh treatment of employees. As state courts used state laws to counter the practices of these large corporations, the corporations began to avoid the jurisdiction of the state courts by forming trusts under the laws of another state to hold the corporate stock. By enacting the Sherman Act in 1890, Congress used the general phrase "restraint of trade" to regulate the decisions of business managers with regard to costs, prices, and output.<sup>94</sup> Because Congress was unable to draw upon a body of economic analysis relating to actual markets and found no settled body of law beyond that of business

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1970) (case studies of selected American industries); J. MARKHAM, *COMPETITION IN THE RAYON INDUSTRY* (1952) (study of competition and monopoly in rayon industry); J. MCKIE, *TIN CANS AND TIN PLATE* (1959) (study of competition in two related industries); W. NICHOLLS, *PRICING POLICIES IN THE CIGARETTE INDUSTRY* (1951) (analysis of price and production policies); M. PECK, *COMPETITION IN THE ALUMINUM INDUSTRY* (1965) (study of aluminum industry).

92. See, e.g., Stocking & Mueller, *The Cellophane Case and the New Competition*, 45 AMER. ECON. REV. 29, 29-30 (1955) (discussing *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953). For a bibliography of such works, see 8 A.E.A. READINGS IN INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 393-426 (W. Heflebower & G. Stocking eds. 1958).

93. 1 S. WHITNEY, *ANTITRUST POLICIES* 3-12 (1958).

94. See *supra* note 9 (noting differing views on purpose of antitrust laws).

torts, it turned to the broad, English common law doctrine of restraint of trade.<sup>95</sup>

#### IV

In considering the *INS* case in an analytical context of the economics of industrial organization, two questions arise. How should the issue in the case be framed differently? Given that *INS* and *AP* were competitors, is there an issue of unfairness in *INS* incurring no cost except for copying, in obtaining the news?

Clearly the copyright statute did not protect the news. The court could have disposed of the case in favor of the defendant by invoking the principle that unprotected matter may be freely reproduced. Such an outcome, however, would have left unresolved the residual issue of the "fairness" of *INS* in its unconventional acquisition of the basic ingredient of its product, the news story. The lower courts had raised this fairness issue.<sup>96</sup> Because the copying of *AP* news was coupled with conduct of bribery and inducing breach of obligations, the otherwise lawful copying became associated with illegal conduct and was tainted as a "dirty trick."

In intellectual property cases, courts frequently face allegations of "piracy" and "dirty tricks," without having available a core of analysis suited to drawing the line between "fair" competition and its excesses. In *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*,<sup>97</sup> a more recent copyright case involving financial information, the Second Circuit expressed its disdain for the conduct of a defendant who sold paraphrased abstracts of the financial information copyrighted by the plaintiff.<sup>98</sup> The court affirmed a preliminary injunction, rejecting the fair use defense, noting that "the [defendant's] use of the [plaintiffs'] reports was *blatantly self-serving*, with the obvious intent . . . of fulfilling the demand for the original work. . . . This was not *legitimate* coverage of a news event; instead it was . . . *chiseling* for personal profit."<sup>99</sup>

Although the court did not mention the misappropriation

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95. W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 18-52 (1965).

96. The district court held *INS*'s practice of acquiring the news amounted to unfair trade, and the Second Circuit affirmed. *International News Serv. v. Associated Press*, 248 U.S. 215, 226-27, 231 (1918).

97. 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

98. *Id.* at 96.

99. *Id.* (emphasis added) (citations omitted).

doctrine, the *Wainwright* case posed essentially the same doctrinal issue as *INS* because courts traditionally accord "thin" copyright protection to both news and factual information.<sup>100</sup> Consequently, the same issue is framed: Does a legal doctrine like misappropriation require competitors to incur the same costs for the same inputs? To address this issue, however, one must establish a context in which there is a working rationale for the misappropriation doctrine. Placing the issues of fairness and misappropriation in the context of competition may direct judicial attention away from the fruitless task of characterizing by unstated normative standards the market behavior of a competitor. Instead, the issue becomes one of determining where to draw the line between competition and its socially undesirable excesses.

The *Wainwright* case demonstrates the difference in the two approaches. The *Wainwright* court noted that the defendant had contributed no independent research or analysis,<sup>101</sup> but failed to explain why this was relevant. Under copyright law, only expression is protected; research is not.<sup>102</sup> Failing to conduct independent research triggers judicial disapproval that an underlying legal doctrine does not support.

From this Essay's perspective, however, the *Wainwright* case may be restated in the following terms. At the outset, the context of competition reduces the significance of the ethical issue. From this perspective, the parties, each engaged in a profit-making activity, designed products for sale in a market in which near substitutes were available. Each seller made decisions that modified its cost/revenue calculus. The defendant, perhaps on the advice of counsel, prepared its product without seeking permission or paying a royalty, which from this perspective, was a cost-driven decision. As presented to the courts, the only issue was whether copyright infringement occurred as a result of that cost-saving decision. Despite the rhetoric of the appellate court,<sup>103</sup> cost-saving is not akin to *malum per se*. Because the defendant raised the fair use defense, the court was obliged to apply section 107, and particularly section 107(4), of

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100. A newspaper story may be copyrighted as a literary work, but not the news or factual element. *International News Serv.*, 248 U.S. at 234.

101. *Wainwright*, 558 F.2d at 96.

102. 1 P. GOLDSTEIN, COPYRIGHT § 2.14.4 (1989). See also *Miller v. Universal Studios, Inc.*, 650 F.2d 1365, 1370 (5th Cir. 1981) (research is not copyrightable).

103. *Wainwright*, 558 F.2d at 94-95.



the Copyright Act,<sup>104</sup> which makes relevant the potential market impact of the defendant's action.<sup>105</sup>

Viewing *Wainwright* in the market context provides further insight into the competitive relationship of the parties. The record supports a finding that they sold different products through different channels of distribution, although the court's reference to "chiseling" implies that they sold the same product. The facts state that the plaintiff's product consisted of full financial information about 275 companies, including data about personnel, finances, and sales. The opinion refers to reports some forty pages in length that plaintiff sold directly to a clientele of some 900 banks, insurance companies, and investors, such as mutual funds. The defendant derived its product from the information that the plaintiff's reports provided. Having compiled this information, the defendant sold its product as a weekly newspaper to an unstated number of subscribers consisting of libraries, law and accounting firms, brokerage houses, and corporations.<sup>106</sup>

The significance of viewing the *Wainwright* opinion from the market perspective is that it largely eliminates the ability of a court to dispose of such a case by characterizing the conduct of a party as "chiseling," a doctrine with no analytical basis. Moreover, the market perspective provides a context in which the relevant aspects of the competitive relationship are clarified, leaving the court to determine the final outcome in the case within the statutory framework — in this case, the copyright statute. In these terms the issue could be framed around section 107, the fair use defense. By expressly requiring an inquiry into the market effects of the defendant's action on the plaintiff, section 107(4) provides a framework of decision.<sup>107</sup>

Thus, the *Wainwright* court might have decided for the plaintiff, but only if the plaintiff could show that the defendant's product was so strikingly similar to its own product to permit the inference of copying.<sup>108</sup> Alternatively, the court might have decided in the defendant's favor under the fair use doctrine. Copyright law traditionally affords weak protection

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104. *Id.* at 93-94. The court cites to 17 U.S.C. § 1, the earlier version of 17 U.S.C. § 107 (1988).

105. *See supra* note 24.

106. *See Wainwright*, 558 F.2d at 93.

107. 17 U.S.C. § 107(4) (1988).

108. The reported opinion suggests that the court did not address this issue of unfairness by applying copyright norms; instead, the court decided the case on the general issue of unethical behavior.

to factual works.<sup>109</sup> Absent a showing of economic injury, use of protected factual material short of copying would not be actionable.<sup>110</sup>

Regardless of the outcome, however, the *Wainwright* court should have focused on the issues in terms of the copyright statute, because from this framework the court could articulate the issue of economic injury. Such a focus enables a court to ground its decision in a comprehensible rationale. In contrast, by basing its decision on a subjective standard of ethical commercial behavior of competitors, the court does little but express general disapproval of the defendant's conduct.

The federal antitrust cases involving predatory pricing provide some perspective on the decisional process required of a court facing the task of distinguishing between appropriate competitive behavior and conduct destructive of competition.<sup>111</sup> Courts and commentators developed this body of law to give content to the broad language of section two of the Sherman Act that makes an "attempt to monopolize" illegal.<sup>112</sup> The federal antitrust law is relevant to the misappropriation doctrine in the following ways: It attaches to a course of conduct toward competitors, and the conduct within this ambit includes "dirty tricks" like industrial espionage, sabotage, threats, and false advertising, as well as traditional antitrust violations such as tying arrangements and exclusive dealing.<sup>113</sup> Thus, predatory price analysis centers the judicial inquiry on the specifics of cost and

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109. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 516 (1981).

110. *Id.* at 522.

111. See *infra* note 113. Some cases involving conduct destructive of competition have arisen under § 1 of the Sherman Act. See Hutter, *Dirty Tricks and Section 1 of the Sherman Act: Federalizing State Unfair Competition Law*, 18 B.C. INDUS. & COM. L. REV. 239, 240-41 (1977) (discussing types of business activity prohibited under § 1 as interpreted by the Supreme Court).

112. 15 U.S.C. § 2 (1988).

113. Although the Sherman Act overlaps with business torts largely in terms of boycotts and predatory pricing, there have been a few cases in which other business torts have become the basis of a Sherman Act cause of action. *E.g.*, *Albert Pick Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 97, 100 (1st Cir. 1932) (competitor induced rival's employees to join it and bring with them customer lists, cost data, and other trade information); see also *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879, 879-80 (1st Cir. 1960) (induced employees to leave, misappropriated trade secrets, disparaged products, interfered with supply sources, and brought vexatious litigation); *Perryton Wholesale, Inc. v. Pioneer Distrib. Co.*, 353 F.2d 618, 620-21 (10th Cir. 1965) (induced employees to leave and to urge former customers to trade with competitor).

For a thoughtful analysis of commercial conduct from the perspective of an attempt to monopolize under the Sherman Act, see Cooper, *Attempts and*

pricing practices of competitors instead of on general notions of unfairness.

Analysis of the predatory pricing cases clarifies the misappropriation doctrine by providing a context of inquiry. This context dispenses with the need to construct the question-begging "quasi-property" foundation on which the *INS* majority relied. Predatory pricing analysis directly frames the market conduct of a trader toward its rivals. By drawing on this analysis, courts can examine misappropriation claims to determine whether a seller acted with a purpose other than competition.<sup>114</sup> For example, predatory pricing is a component of an attempt to monopolize when a company, as part of a plan designed to inflict losses on competitors such that they leave the market, makes a pricing decision to sell its products at less than their "cost." Predatory pricing is also part of the offense of predation, such as when a seller plans to recoup its losses from selling below "cost" by charging a "monopoly" price<sup>115</sup> after its rivals are driven from the market.<sup>116</sup>

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*Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974).

114. Competition in the antitrust sense, such as predatory pricing, suggests a rivalry in which a seller offers a superior product at a price lower than average variable cost. This conduct becomes improper when the seller embarks on a course of conduct designed to destroy a rival — selling below average variable cost — with the intent to recoup any losses by charging higher than normal prices after the rival has been destroyed. For an example of a similar case, see *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909), discussed *infra* at note 130 and accompanying text.

115. A monopoly price is one yielding a return above normal profit margins.

116. Areeda & Turner, *Predatory Pricing and Related Practices Under Section Two of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975) [hereinafter *Areeda & Turner, Predatory Pricing*]. See also 3 P. AREEDA & D. TURNER, *supra* note 9, ¶ 715 (noting that a monopolist's predatory pricing can threaten the survival of equally efficient rivals). Predatory pricing is one aspect of business conduct which has the purpose of advancing the perpetrator's market position by means other than offering a better product or service at a lower price. Examples of predatory behavior not relating to price would include conduct seeking to drive actual or potential competitors from the market by threats or intimidation, concentrating sales effort on the customers of a competitor, and making exclusive arrangements among a few sellers. An analysis of past and recent predatory practices is given by Cassady & Brown, *Exclusionary Tactics in American Business Competition: An Historical Analysis*, 8 UCLA L. REV. 88 (1961). Another example of predatory exclusion is reported in the famous *Mogul S.S.* case, *Mogul S.S. Co. v. McGregor Gow & Co.*, 23 Q.B.D. 598 (1889). There, a group of established steamship operators agreed to share the existing tea trade in the Far East by excluding any new entrant. In this case, predatory pricing was employed against a would-be, non-member entrant. The existing ship owners would quote a below-cost price in order to

Analogizing to predatory pricing analysis when analyzing misappropriation claims has the further advantage of requiring courts to examine the boundaries of "appropriate" competition in cost/price terms, rather than in ethical terms.<sup>117</sup> By examining the cost position of competitors in the market, courts can more sharply focus on the nature of the competitors' rivalry. Applying this approach to *INS*, the Court would have inquired whether a legal principle requires competitors to bear the same mix of costs. This inquiry would have required the Court to determine whether the second entrant in the market, *INS*, breached some policy interest when it appropriated an unprotected input of a rival seller, the news stories of *AP*.

A proposal that Areeda and Turner originally made is useful at this point. Areeda and Turner suggested a direct, straightforward test to determine when a seller's pricing is "predatory."<sup>118</sup> Under their analysis, short-run marginal cost would be the touchstone of whether a seller was engaging in predatory pricing.<sup>119</sup> As a concession to evidentiary considerations, they ultimately adopted short-run average variable cost as the test because reasonable cost accounting methods made it easier to determine.<sup>120</sup> Under this test, if the plaintiff showed that the defendant sold its product below short-run average variable cost, the plaintiff established a prima facie case of preda-

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deter entry. This case is analyzed by Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J. L. & ECON. 129, 137-42 (1972). The most famous antitrust case of predatory conduct involves the Standard Oil Trust. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The correctness of that decision is questioned by McGee, *Predatory Price Cutting: The Standard Oil of New Jersey Case*, 1 J. L. & ECON. 137, 137-38 (1958).

117. Although this perspective is not a rosetta stone for deciding all cases, it does afford a court faced with a misappropriation claim an evidentiary basis — in terms of cost — to distinguish an "unfair" or "dirty trick" situation from a properly competitive situation.

118. See Areeda & Turner, *Predatory Pricing*, *supra* note 116, at 712-13; see also 3 P. AREEDA & D. TURNER, *supra* note 9, ¶ 715. The substantial case law developing predatory pricing analysis centers around Areeda & Turner's proposal.

119. P. AREEDA & D. TURNER, *supra* note 9, ¶ 715; Areeda & Turner, *Predatory Pricing*, *supra* note 116, at 712-13.

120. Marginal cost is defined as the addition to total cost attributable to the production of one additional unit of output. Although an important theoretical construct for analytical purposes, obtaining the data for an actual production process is recognized as involving substantial complexity. Average costs comport more closely with actual record keeping. C. FERGUSON & J. GOULD, *MICROECONOMIC THEORY* 179-204 (4th ed. 1975).

tion,<sup>121</sup> which would prompt a full scale factual inquiry.<sup>122</sup>

Two elements relevant to misappropriation analysis may be drawn from this concept: low prices are the essence of competition, and costs are the determinants of supply.<sup>123</sup> From this perspective, conduct of a rival such as the taking of the news by INS is considered as a cost-saving action, the significance of which is best determined by viewing the conduct in a competitive context. This approach eliminates the need for a "quasi-property" rationale. A court should note, however, that any legal restraint on the decision of a seller to lower prices runs the risk of undercutting the competitive process itself. Indeed, the insensitivity of the *INS* majority to the process of competition is its singular defect.

In addition, pricing decisions of sellers are not meaningfully considered outside the market structure in which the practice occurs. Courts recently have recognized this limitation by taking market structure into account when assessing price behavior as predatory.<sup>124</sup> Similarly, the Supreme Court has taken the position that recoupment from lost sales is unlikely unless barriers to the entry of new competitors exist; thus, low prices alone are not probative of predation.<sup>125</sup>

This discussion suggests that pricing decisions are central to competition; moreover, because costs are the determinants of

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121. Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 751-52 (1981).

122. The meandering course of this doctrine in the courts and law reviews is beyond the scope of present concern. See Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 264, 268-76 (1981) (arguing that predatory pricing is not rational economic behavior).

123. Areeda and Turner, in their exposition of predatory prices defined variable costs as including "only the following: (1) capital costs (interest on debt and opportunity cost of share capital) attributable to investment in land, plant, and equipment; (2) property and other taxes unaffected by output; and (3) depreciation on plant." See P. AREEDA & D. TURNER, *supra* note 9, ¶ 715c. They also advocated that the elements of average variable cost be defined at the outset in each case. *Id.*

124. R. BORK, *supra* note 9, at 145; Easterbrook, *supra* note 122, at 268.

125. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986), the Court, in dictum, expressed doubt that predatory pricing could take place by a firm which only had a 21% share of the market. The Court adopted the view of Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 292 (1977), that predatory pricing would not be viable for a firm with less than a 60% market share. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590-91 (1986), the Court again stated that the defendant would not be able to recoup from a below cost sales period by charging supranormal prices in the future unless there were substantial barriers to the entry of new firms.

supply, courts should consider costs as the gateway to the production of competing products. Consequently, courts should also view cost savings, such as taking news stories without permission or payment, as governing the possibility of entry by a competitor. The context in which courts view cost decisions should include evidence of the existing firm's market position. Thus, when a new competitor seeks to enter a market dominated by a single seller whose sole access to a basic input virtually forecloses rivals, the newcomer may lawfully rely on the fact that the input — in the *INS* case, the news — is not within the scope of copyright protection. Thus, this approach allows courts to avoid the need to characterize the conduct of a defendant as a "pirate" or a "chiseler," but rather to view the conduct as a cost-saving activity and to consider its significance in a competitive context.

The *Wainwright* case demonstrates the superiority of this approach. In the actual decision, the defendant never fully presented its copyright issue. It raised the fair use defense, but the court rested its decision on the "chiseling" misappropriation of the plaintiff's material.<sup>126</sup> The characterization of the defendant's conduct foreclosed the copyright issue of market effect, an analysis that section 107(4) of the Copyright Act requires. Although the case seems to hold that the defendant misappropriated the plaintiff's material, the copyright analysis is lacking.<sup>127</sup> The Court ignored the issue of infringement and the application of the fair use defense. The outcome might well have rested on a finding of substantial taking, which in a commercial context forecloses fair use. Conversely, the court might have concluded that, as a fact, the plaintiff was entitled to "thin" protection, which would give judgment to the defendant in the absence of a showing of economic harm.

This approach should also apply to the *INS* case. From the suggested perspective, a court would frame the issue at the outset as whether *INS* breached any competitive legal norm when it sold a product in competition with *AP* without incurring the same costs of producing that product. To decide the issue, courts could look to the predatory pricing literature, as well as the equally voluminous literature of price discrimination under the Robinson-Patman Act or the calculation of "foreign market

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126. *Wainwright Securities, Inc., v. Wall Street Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

127. Consequently, the decision is instructive neither to the bar nor to the litigants.

value" under the anti-dumping provisions of the Trade Act.<sup>128</sup>

This perspective would demonstrate that AP had a different cost structure from INS in acquiring the basic input of the competing products. In the actual case, the record contained no evidence on cost or prices, but it may be assumed for purposes of exposition that news gathering costs were significant, constituting, perhaps, forty percent of the plaintiff's total variable costs. By viewing the parties as competitors with this cost differential in mind, the court would decide whether the defendant's conduct was predatory being designed to destroy AP as a competitor. At least one court has applied such an analysis.<sup>129</sup> In the famous Minnesota barber case, the Minnesota Supreme Court recognized that commercial conduct that seeks vengeance rather than profit may be outside the competitive arena and actionable in tort.<sup>130</sup>

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128. Price discrimination within the meaning of the Robinson-Patman Act, 15 U.S.C. § 13 (1988), means two sales made at two different prices. The economist's definition means two sales made at two different rates of return to the seller — meaning different cost structures. See Spence, *Product Selection, Fixed Costs, and Monopolistic Competition*, 43 REV. ECON. STUD. 217, 217 (1976). Courts often confuse these issues to the detriment of competitive outcomes. See, e.g., *Utah Pie v. Continental Baking Co.*, 386 U.S. 685, 702-03, 703 n.15 (1967).

In the trade legislation, the emphasis is also on "fairness" among rival sellers in international transactions. Again, the determination is made by reference to prices and to their underlying cost structures. Congress, in 19 U.S.C. § 1677(b) (1988), provided the most complex formulary approach to determining whether the foreign seller's price in the United States is a competitive, "fair" price or constitutes "dumping." This provision requires alternative ways of computing the foreign market value of a product imported into the United States as the reference point of decision. In addition to the actual selling price in the normal course of business by unrelated persons, a statutory "constructed value" may be used. This calculation begins with the cost of materials and requires the addition of processing costs, general expenses, and profit. The amount of profit is also limited.

The relevance of these other pricing statutes to misappropriation is the emphasis on the relationship between costs, including cost saving, and price in characterizing the competition as "fair" or "unfair."

129. *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909).

130. A famous Minnesota case states a variant of predatory pricing by holding that seeking vengeance under the guise of competition is actionable in tort. See *id.* The Minnesota Supreme Court held actionable the competition of a banker with the established local barber by equipping a shop and giving it rent-free to another barber as part of a program to drive the established local barber from the town. *Id.* at 151-52, 119 N.W. at 948. The court distinguished competition from the destruction of trade as follows:

To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit . . .

Alternatively, the court might have considered AP's status as a participant in a competitive market for the sale of newspapers and advertising. By recognizing that the AP news was not copyrighted, the court might have considered whether INS caused AP any economic injury outside the bounds of commercial rivalry. From this perspective, Justice Brandeis's dissent might better have been the majority opinion. Absent a finding of predatory, extra-commercial conduct, the court would consider the responsive alternatives open to AP. The court might conclude that AP suffered no long-term injury because it could seek, at little cost, to copyright its stories as a means of obtaining injunctive relief against actual piracy. In the alternative, AP, at modest cost, could secure its bulletin boards and enforce its by-laws by expelling from membership those who assisted INS. In addition, AP could have used its control over the news stories to create a lead-time advantage by delaying the transmission of the stories to its west coast members by an hour or so. This delay would thwart INS attempts to copy the news stories, thus causing west coast INS papers to miss an edition or an entire day.<sup>131</sup>

Finally, the court might follow the dissent of Justice Holmes and hold that the taking was not actionable, but provide AP name recognition and credit in the marketplace. Because the *INS* majority failed to address any of these issues at the core of the competitive process, its opinion gave rise to an ad hoc rationale grounded only in a reaction to distasteful conduct and therefore devoid of analytical content.

### CONCLUSION

This Essay argues for a limitation on the application of the misappropriation doctrine. Two factors support this conclusion. The United States Supreme Court has repeatedly invoked federal preemption to preclude state law intrusion into issues of competition. Courts should extend this principle to inhibit federal judges from applying federal common law doctrines, such as misappropriation, in cases arising under federal intellectual property laws. In addition, as courts presently apply the misap-

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regardless of the loss to himself and for the sole purpose of driving his competitor out of business, . . . he is guilty of . . . an actionable tort.

*Id.* at 151, 119 N.W. at 948.

131. This lead time benefit is noted by Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299-302 (1970).



propriation doctrine, it cannot serve the function of a broad equitable principle suited to restrain the excesses of competitive behavior.

This Essay recognizes the need for such a limiting doctrine. Thus, the Essay contends that the misappropriation doctrine be given analytical content by examining misappropriation issues in the context of competitive markets. By viewing the conduct of a defendant from the perspective of a cost-saving, market entrant, courts can avoid engaging in subjective assessments of the ethical nature of certain competitive behavior. By eliminating such assessments, courts are better able to draw the line between socially beneficial economic rivalry consistent with competition, and anti-social, destructive conduct inconsistent with competition. In this model, judicial attention will be centered on the intellectual property law principles at issue, leaving courts to draw on the misappropriation doctrine in the relatively rare instances when traditional intellectual property principles lead to perverse and unacceptable outcomes.