

We've surveyed some of the criticisms of our analyses of the effect of aggregators on the news business, and our proposal to restore common-law unfair competition principles to the news business. We offer these responses:

1st criticism – hot news: The INS v. AP species of unfair competition carries severe 1st amendment risks, says the critic. Suppose, for example, the critic explains, TMZ is interviewing Michael Jackson at Neverland Ranch. Jackson drops dead during the interview from an apparent heart attack. TMZ reports that fact on its website right away. Does that mean that only TMZ can report that fact for a period of time, say 24 hours?

Short answer: No.

Response to 1st criticism:

First: Understand the difference between statutes and the common law. This Michael Jackson hypothetical is a good example for contrasting the effect of a statute against the effect of the common law. We oppose the notion of a statute decreeing a moratorium on publishing an originator's news for any fixed period of time.

In our hypothetical, if a statute barred anyone but TMZ from publishing the Michael Jackson death for 24 hours, our critic would have a powerfully valid point. Statutes are inflexible and don't admit of any exceptions unless the legislature specifies express exceptions.

Judges aren't supposed to craft their own exceptions to statutes, and usually they don't. Judges can interpret the constitution to trump a statute or to modify a statute. But, otherwise, judges are bound to the letter of what the legislature decreed. Because of that, definitive statutes can empower people more than they should be empowered. We oppose that, just as our critics do.

We advocate instead restoring common-law unfair competition principles to the news business. Those principles applied to the news business in 1918. They are effectively absent now. Their absence is helping to drive the originators of written news reports out of business.

We advocate restoring those common-law principles simply by changing the copyright act to say that it does not pre-empt common-law unfair competition, and specifically does not pre-empt the species of unfair competition that underlies the United States Supreme Court opinion in *International News Service v. Associated Press* (1918).

We endorse the common-law analysis of Professor Callmann in his 1942 Harvard Law Review article, which our analysis cites. [Rudolph Callmann, *He Who Reaps Where He has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 Harv. L. Rev. 595, 599 (1942).]

The common law is markedly more flexible than any statute ever could be. If judges are working with common law, they have the flexibility to apply legal reasoning and precedents to achieve just results under the specific circumstances presented to them. They can adjust the common law incrementally to conform to the most persuasive legal arguments that competing adversaries provide in the

context of the real-life predicament presented to the judges. Computers don't decide cases, people do.

Also, statutes almost never state the reasons for their usually rigid rules, which enhances their rigidity. Appellate courts, however, virtually always state their reasons for their rulings. An effect of those stated reasons is to give future litigants the opportunity to present new circumstances and new rationales that might cause appellate courts to adapt the common law to new circumstances and new arguments.

Second: Depending on the context, competitors don't necessarily free-ride in the unfair-competition sense by reporting that "TMZ reports that Michael Jackson is dead."

Suppose that, 30 minutes after TMZ reported on its website that Michael Jackson is dead, the LA Times reported on its website: "TMZ reports that Michael Jackson collapsed during a private interview with a TMZ reporter at Neverland, and died. The Times is working to confirm that story."

In that context, the LA Times report probably does not function primarily as a substitute for the TMZ report. That's because the content of the LA Times report is so truncated that it functions as a headline for the TMZ report. Until the Times reports more information, saying *only* that TMZ reports that Michael Jackson died suddenly during an interview likely will drive a large proportion of the readers of the LA Times to TMZ. It probably won't function as a *substitute* for TMZ.

In that sense, the LA Times report analogizes to what pure aggregators do. Pure aggregators provide headlines that describe more substantive reports on originators' websites, driving reader traffic to those sites.

But, if the LA Times were to continue to summarize only what TMZ reports, adding more and more information gleaned from TMZ's website as the story unfolds, the LA Times' role would change. The Times would evolve into that of a parasitic aggregator, as we explain next.

Third: Under what circumstances would the LA Times become a free-rider on TMZ's journalistic services under common-law unfair competition theory?

Suppose that the LA Times decided not to use any of its journalistic resources to try to verify the TMZ story about Michael Jackson's death. Instead, the LA Times chose to rewrite on its site the essence of TMZ's original reporting as it appears on TMZ's site.

And suppose that the LA Times continues to do that as long as it decides that the TMZ stories are newsworthy, and, of course, the LA Times sells display ad space around its stories. Even if the Times adds a link to TMZ, that is free-riding, and common-law unfair competition theory that we endorse would create civil liability for that practice.

Suppose that the LA Times deploys its own journalists to try to verify TMZ's report, while publishing on its own site: "TMZ reports that Michael Jackson collapsed during a private interview with a TMZ reporter, and died. The Times is working to confirm that story."

And suppose that the Times eventually confirms the story with its own journalists, reports its confirmation, and maybe adds new information. That is not free-riding, and common-law unfair competition principles won't create liability. In fact, the U.S. Supreme Court said as much in *INS v. AP*.

Can we instantly know who is a tortious free-rider and who is not? Sometimes we can; sometimes it's debatable. We address that later in this response.

Fourth: Generalities that you can derive from our hypotheticals.

When the substance of an aggregator's for-profit, contemporaneous rewrite of an originator's news report functions as a headline that moves reader traffic to the originator, the common-law theory that we advocate would not create any liability for the aggregator. Headlines attract interested readers to stories; for those readers, headlines don't typically supplant the story.

But when those for-profit, contemporaneous rewrites include enough extra substance from the originators' report to function chiefly as a close *substitute* for the originator's report, the aggregator becomes a parasitic free rider. Our theory would subject *that* aggregator to civil liability as an unfair competitor that has unjustly enriched itself by commercially exploiting the journalistic investments of the originator.

That would not be true, however, if the aggregator used its own journalistic resources to confirm the report or to build on it by discovering and reporting new information.

Is there a gray area? Certainly, but, as a practical matter, that does not mean that common-law unfair competition cannot work or should never apply to the news business. There are plenty of gray areas in law. Common-law libel, common-law fraud, common-law wrongful death, and even common-law negligence have gray areas, but those common-law principles have survived and evolved and benefited American and English societies for centuries.

Does the aggregator who rewrites originators' news for profit have no choice but to go out of business? No. That aggregator has six choices. They are:

1. Use its own resources to confirm or expand upon the facts uncovered and reported by the originator.
2. Contract with the originator to carry contemporaneous rewrites.
3. Become a for-profit pure aggregator by reporting the originator's headlines and linking to the originator's report -- for free and without a contract.
4. Postpone the for-profit free-riding until the bulk of the commercial life of the original news report has elapsed.
5. Stop using contemporaneous rewrites to compete commercially online with the originators.
6. Continue doing business as a parasitic aggregator and wait to see if you get sued.

Fifth: Under common-law unfair competition, what happens to the for-profit aggregator whose rewrites become substitutes for the originator's report?

If common-law unfair competition principles applied to a free-riding aggregator, that aggregator would have civil liability to the originator *if* the originator chose to spend the money to sue the aggregator.

The common-law remedies for the originator would be for the court to require the parasitic aggregator to disgorge unjustly received ad revenue and an injunction barring the aggregator from free-riding during the bulk of the short commercial life of the originator's news reports.

The details of all of that would be sorted out in the court case with adversarial arguments, cross-examination, and the usual judicial mechanisms to try to establish the truth and the best answer. That's how every common-law case works, from injury cases to libel cases to fraud cases (all of which are common law).

The remedies of disgorging unjust enrichment and injunction already exist at common law for other species of unfair competition. They would extend automatically to a restored *INS v. AP* species of common-law unfair competition.

The loser in the court case may appeal to an appellate court, which means that at least three judges will review the case. Their ruling will create a flexible precedent that will greatly influence, but not mandate, what should happen in analogous future situations.

For example, if every county in your state withholds 911 tapes, insisting that they are not public record, you need to sue only one county over one withheld 911 tape to change the law statewide. If that suit yields an appellate opinion ruling that the 911 tape that you wanted is public, that court's stated reason typically would have the effect of causing all of the counties in your state to release all 911 tapes.

The appellate opinion in the 911 suit might not declare that all 911 tapes are public under all circumstances, but the reason that the court gives for rejecting the county's argument will have a ripple effect. Other counties may see from the court's opinion that they have no better arguments for withholding their 911 tapes. So they release their tapes, seeing that withholding them would be futile.

*That is the common law – a body of analogical reasoning based on principles of law that an appellate court announces in its opinion as the court's rationale for deciding the case the way that it did. The rationales explained by the appellate courts influentially guide courts and people in deciding what to do in similar future circumstances, but the courts' opinions don't usually *mandate* what everyone must do in all future circumstances.*

Sixth: The economic realities of litigation make the gray areas in discerning parasitic free-riders less important.

Two competing interests converge when mixing law with real life.

First competing interest: Businesses pay lawyers by the hour to sue, and legal fees for a single case can mount up. Rational businessmen and women have no economic motive to expend \$90,000 or more to prosecute cases that test the limits

of their common-law rights if doing so runs a high risk of creating a precedent that might undermine those rights in the future.

That is because of the common-law's flexibility. Judges can adjust the common-law incrementally to move toward the most persuasive legal arguments based on the particular predicaments that litigants ask them to resolve. They can do that if their professional judgment tells them that reaching a just result requires a modest or even abrupt departure from existing precedent.

So originators of news usually would have little incentive to test their common-law rights in close cases. They prefer clear cases – especially in an area where the parameters of common-law rights are fluid enough to enhance the risk of creating “bad” precedent. Recall that the copyright holder of the Zapruder film of President Kennedy's assassination lost in litigation to enforce that copyright against alleged unauthorized use of the film. What judge wants to rule that only one person can control for decades all public access to that historically unique and valuable record? Again, computers don't decide cases, people do.

Second competing interest: No one conforms all of their conduct to avoid common-law civil liability all of the time. Common-law libel is an example. Everyday, large metropolitan newspapers and major market TV stations publish reports that technically amount to libels.

Here's a commonplace example. A man carrying a concealed handgun enters a convenience store during the day, robs the cashier at gunpoint, and flees. The police release to the press and to TV a photo of the man taken by the store's security camera when the man entered the store. The newspapers and the TV

news organizations report that police want the pictured man for the alleged robbery, and accompany those reports with the photo.

That is libel in many states, including Ohio. In many states, there's no privilege that protects a report like that when there's been no arrest and no formal criminal charge. And, you can be sure that no journalist independently investigated whether the man in the photo actually committed the robbery. Yet, news organizations routinely publish such stories.

Editors often make news judgments so automatically that they are not consciously playing out their rationales. Editors publish those technical libels because they perceive the importance of the story to outweigh the liability risk substantially. And they are right. There is theoretical liability, but as a practical matter, those fugitives don't sue. And those stories are important to the public.

The upshot of those two competing interests converging. The practical reality of restoring common-law unfair competition to the news business is this:

To avoid common-law liability, the aggregators will rein-in their most flagrant free-riding when competing directly with originators of daily news stories, and the originators will tend to sue only the most flagrant free-riding competitors that remain -- assessed by the degree to which the free-riding directly competes with the originator for readers and advertising.

Most free-riders will opt to become pure aggregators without contracts, to postpone free-riding for a day, or to contract with the originator of news reports to carry contemporaneous rewrites.

Some free-riders may opt to go non-profit, as do some bloggers. Our theory probably would not subject non-profit free-riders to any civil liability unless they charged a fee to advertisers, readers, or both.

So, the hypothetical of the free-riders being afraid of common-law liability if they report that TMZ says that Michael Jackson has died is a fringe case that won't yield litigation or self-censorship. To avoid creating a bad precedent, the originator won't sue the free-riders, and the free-riders will take the risk of reporting that extraordinary story even if the originator had the common-law right to prevent it.

Moral: Free-market minded Alexander Hamilton once wrote: "If the abuses of a beneficial thing are to determine its condemnation, there is scarcely a source of public prosperity which will not speedily be closed."

Alexander Hamilton's words are especially apt here. It is ludicrous to speculate by citing fringe examples that the sky will fall if common-law unfair competition principles return to the news business. The sky is falling today. The status quo is helping to kill the news business *now*. No speculating is needed. Common-law unfair competition is nothing radical; it enforces free-market principles of being able to reap what you sow; and it enables the free market in ideas to exist beyond the vacuous vocalizing of uninformed opinions.

Common-law unfair competition used to apply to the news business, and the law must restore it or there won't be a news business.

2nd criticism – commentary about the news: The INS v. AP species of unfair competition theory carries other severe 1st amendment risks, says the critic. The critic posits: Suppose the Columbia, South Carolina newspaper breaks the story about Governor Sanford and his paramour through the newspaper's own investigative efforts. Does that mean, the critic asks, the no one can comment about the story for some period of time because doing so would free-ride on the journalistic services of the South Carolina paper?

Short answer: No.

Two grounds overlap.

1st ground: blogging and columns are remote substitutes for the news story.

Reading a column or blog to learn the news is much like walking into a movie one-hour after the movie began and then trying to figure out what happened during the part that you missed. There usually is not enough factual context or raw factual information in a blog or column to substitute for the underlying news story unless you've already read it.

For example, Gail Collins recently wrote a column that included commentary about the e-mails between Governor Sanford and his paramour. If you never read any reports that describe the contents of the e-mails, you would find Collins' column to be a poor substitute for getting a more direct report about them. In fact, her column may cause you to search the New York Times website to find a news report about the e-mails. That is because her column expects that the reader already knows the basic facts about the e-mails' contents.

2nd overlapping ground: transforming facts into comment. An overlapping reason that our common-law theory would not apply to many columns and blogs is that the typical column or blog transforms the factual report into something different.

The commentary is organically different from the underlying facts. The commentary is not really substituting for the factual report; it is developing or transforming the factual report into something different that does not really compete unfairly with the factual report.

And, that something “different,” may cause readers to seek out the underlying factual report to better appreciate the commentary, much as visitors to Google News click on a headline to find out more information from the original source.

What about adding comment as a pretext for free-riding? Adding commentary as a pretext for free-riding is not an automatic free pass to drive a competitor out of business. If a blogger persists in rewriting for profit the heart of originators’ daily news reports, but adds a sentence or two of comment, the comment is no problem.

But the common law will ask whether the blogger consistently presents so much of the originator’s factual information as to cause typical readers to substitute the blogger’s summary of the facts for the originator’s report at the time when the originator’s report is at the height of its brief commercial life and on the same medium (online). The common law won’t inhibit the commentary, but in those circumstances it could inhibit the extent of the blogger’s timely for-profit rewrites of the originator’s facts.

Common-law reasoning gives judges and appeals courts the flexibility to resolve those kinds of difficult issues if any come before them. The United States Supreme Court ruling in Valentine v. Chrestensen is an example. 316 U.S. 52 (1942).

When the Court decided Valentine, the First Amendment didn't apply to advertising. New York City had an ordinance that barred people from distributing handbills if they were "advertising matter." A man who owned a submarine moored at a pier passed out handbills to passersby. One side of the handbill advertised tours of his submarine for an admission price. The other side was a protest against the city for refusing to allow him to moor his submarine indefinitely for exhibition.

Authorities cited the submarine owner for violating the ordinance. He argued that his handbill was as much noncommercial speech as advertising.

The Court ruled, however, that the facts "justify the conclusion that the affixing of the protest . . . to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance." The Court added: "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civil appeal, or a moral platitude, to achieve immunity from the law's command."

3rd criticism: Your theory threatens the First Amendment right to report news to the public that someone else discovered.

Short answer: No it doesn't.

The First Amendment guarantees that you can speak freely, but it does not compel you to give away your speech for free.

Obviously, the First Amendment does not compel one news organization to subsidize a competitor with free journalistic services. Yet that is what the copyright act effectively compels today.

For example, the First Amendment protects nonfiction books, but it doesn't require Borders Books to give half of its nonfiction book inventory to Barnes & Noble so that Barnes & Noble can compete against Borders by selling contemporaneous abridged versions of those books for 90% below Borders' prices.

Here's a twist on an actual case to illustrate the point further. Pretend that the law does not give anyone a property right in the factual circumstances that unfold in playing a major league baseball game.

Suppose that the Pittsburgh Pirates baseball club contracts with Pittsburgh radio station KDKA to broadcast live play-by-play of all Pirate games. The Pirates supply the announcers. The Pirates and KDKA negotiated the contract price that KDKA must pay. In gauging how much it was willing to pay, KDKA estimated how much revenue it would receive from selling air time for commercials during the play-by-play.

A competing Pittsburgh radio station, KQV, sends one of its sportscasters to the roof of a building near Forbes Field, where the Pirates play their home games. Walls surround Forbes Field, but there is no roof.

From the roof of the nearby building, the sportscaster has an unobstructed view of the game and is close enough to describe what's happening. With binoculars, the sportscaster can see the numbers on the players' jerseys. So the station has its sportscaster give real-time play-by-play of the Pirate home games from the roof of the building.

Another competing Pittsburgh radio station, WWSW, decides to do the same thing with one of its sportscasters from a balcony on another nearby building.

The competing stations' sportscasters use their own words to describe the facts that they see as the game unfolds. All three stations compete for advertisers and listeners. Because the other stations didn't pay anything to the Pirates, the other stations can sell ad time profitably at lower rates than can KDKA. They attract advertising money away from KDKA, and KDKA cannot match their ad rates profitably.

The Pirates and KDKA sue the other two radio stations for unfair competition and unjust enrichment under common law. Even though the first amendment applies to the various sportscasters' real-time descriptions of the facts taking place on the baseball field, the first amendment probably will not interfere with the asserted common-law rights of the Pirates and KDKA. They will probably get a court order to force the other stations to stop the real-time play-by-play or to disgorge their ad

revenue, and an appellate court probably would affirm that order, rejecting the radio stations' first amendment defense.

But if KDKA and the Pirates sued to bar KQV and WWSW from broadcasting a post-game summary of what happened, the first amendment would intervene and defeat the suit. Generally, the first amendment will respect valid legal interests that interfere with speech until the force of those interests diminishes.

As we explained in response to the 1st criticism, there are a variety of options available to those who wish to rewrite others' news stories for profit. The for-profit aggregator can wait to free-ride until most of the commercial life of the initial news story has dissipated. For most news reports, that is probably about a day.

Or the aggregator can contract to carry contemporaneous rewrites of an originator's story, or the aggregator can become a pure aggregator without a contract or paying money, or the aggregator can expend its own resources to verify the report or to discover and write about new information.

4th criticism: Your theory would allow the discoverer of news to own it.

Short answer: No it wouldn't.

Our unfair competition theory would not grant an originator of a news report any property interest in the facts that they uncover and report, and we oppose granting them any property right in the factual substance of news.

We propose restoring what the law calls a “relational” interest. It is an interest against an unfair competitor commercially exploiting my journalistic services in competition with me without compensating me, but it is not a property right.

Here's an example. Pretend that all players, coaches, and general managers for all National Football League teams are employees at will – they have no employment or personal services contracts.

Suppose that Rupert Murdoch started a league of pro football teams in the United States to compete directly with the NFL, but Murdoch's league had no one experienced in running the pro football business, and no experienced players or coaches.

Murdoch needs his league to be good right away to attract television viewers and attending fans. So Murdoch systematically and quickly hires away the most experience NFL business, coaching, and player talent.

Does the NFL own those business people, coaches, or players? Of course not. The 13th amendment outlaws slavery.

Can the NFL get a court order enjoining its employees from jumping to Murdoch's league? No.

Can the NFL get a court order barring Murdoch from raiding the NFL of its best employees without compensating the NFL? Yes.

Even though the NFL doesn't own its employees and can't stop them from going to Murdoch, the NFL has a relational interest with its direct competitor – Murdoch – that gives the NFL a common-law right to require Murdoch to compensate the NFL for the sudden and systematic draining of the NFL's human resources, or to require Murdoch to stop the wholesale raiding of talent that the NFL developed and using them to compete directly against the NFL.

5th criticism: Your proposal will generate lots of litigation; a statute would be better because everyone would know the rules, thus leading to less litigation.

Short answer: That is a myth.

First: It takes as much litigation to enforce statutory rights as it does common-law rights. People don't obey civil statutes simply because they are there. If you want people to obey your statutory rights, you usually have to sue them. Also, people sue over what statutes *mean* just as often as they sue in common-law situations.

Second: Suing over statutes can engender especially wasteful litigation. Litigants pay tens-of-thousands of dollars in legal fees fighting about what statutory words *mean*. They even fight over whether a statute's *silence* about a circumstance has meaning, and they fight about what that meaning is.

At common-law, however, the legal fees are spent to obtain rulings to establish whether a particular *activity* is wrongful or okay under real-life circumstances. Often, that produces more useful results than spending legal dollars to prove what a statute's words mean.

The upshot: Both statutes and the common-law engender equal volumes of litigation, but litigating common-law rights is a more efficient and effective use of those legal dollars.

Third: Suppose that in your state, landowners had common-law rights to sue trespassers on their land. Then, the legislature abolished all common-law trespass

rights. That made it legal to trespass on all private property. And suppose that it became commonplace and even traditional during most of a century for passersby to walk across and even encamp on each others' land. Then, the legislature restored common-law rights to sue for trespass. Would that generate litigation? Of course it would. Does that mean that restoring private property rights against trespass shouldn't happen?

When the legislature outlawed drunken driving, that yielded litigation, too. Does our distaste for litigation mean that we shouldn't outlaw drunken driving?

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