2003

Copyright As Tort Law's Mirror Image: 'Harms', 'Benefits', and the Uses and Limits of Analogy

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TWO PAPERS:

(1) COPYRIGHT AS TORT LAW'S MIRROR IMAGE: "HARMS," "BENEFITS," AND THE USES AND LIMITS OF ANALOGY

AND

(2) OF HARMS AND BENEFITS: TORTS, RESTITUTION, AND INTELLECTUAL PROPERTY

reprinted from 21 JOURNAL OF LEGAL STUDIES 449 (1992)

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Copyright As Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy

Wendy J. Gordon*

I am truly delighted to be in Sacramento at McGeorge School of Law today. I say that not simply because of the charms of the campus and the hospitality of the deans and faculty. More importantly, McGeorge is a school where the skill of communicating ideas has been burnished like a fine necklace. It is quite an honor to be placed among your teachers, even for these few days.

The *McGeorge Law Review* is republishing an article of mine entitled *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*,[1] to which this talk is an introduction. The talk shares with the article the view that one can learn much about traditional common law doctrines on the one hand, and about statutory intellectual property on the other, by comparing the doctrines and logic of the two regimes.

However, in *Of Harms and Benefits*, my main concern had been to explain differences between the common law of restitution and the statutory law of intellectual property. Today's talk does not ignore those issues, but its primary focus is different: it focuses on the law of personal injury, and how tort law[2] compares with copyright law. I suggest some ways in which the law of personal injury and copyright law function as reversed but parallel mirror images of each other. In this talk, I shall also suggest, much more tentatively, some ways in which *non*-parallel treatment might be desirable.

One of my goals is to help students unfamiliar with copyright law to understand its underlying dynamics. Features of copyright law that may seem strange (such as term limits) actually implement goals whose operation we see every day in more familiar doctrines, such as tort law. Therefore, I shall begin by employing the neoclassical economic understanding of personal injury law[3] to explain why, from a functional perspective, a legislature might find it a good idea to give authors a right to recover against copiers.[4]

 Wendy Gordon is Professor of Law and Paul J. Liacos Scholar in Law at Boston University School of Law. The article is dedicated to Allan Axelrod. I thank Bob Bone, Peter Goldberger, Alon Harel, Brandy Karl, Fred Moses, and David Nimmer for their comments, and, most of all, I thank the McGeorge community for its stimulating suggestions and generous discussions.

1. Wendy J. Gordon, *Of Harms and Benefits; Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD., 449 (1982), reprinted *infra* at 541.

2. Let me stipulate that the word "torts" in the title of this article, and in the following discussion, functions as shorthand for the kinds of personal injury torts that are studied by first-year law students. As a formal matter, admittedly, the legal category "torts" is in fact larger: it includes virtually all non-contractual rights to recover for harms done or for invasion of right. (In fact, infringement of copyright is a tort.)

3. The canonical source here is GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (Yale U. Press 1970).

4. Economics is not the only possible source of copyright law. Authors have some justice-based claims as well. *See* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1353-54, 1446-69 (1989). Nevertheless, current law gives copyright owners a scope and length of rights much in excess of what Lockean and related notions of

Central to the economic argument is the following notion: privately motivated decisions will also serve social ends if the decision-maker has sufficient reason to take social effects into account. As you might imagine, the interesting questions center not around this notion itself—it is virtually tautological, after all, to say that someone will take other people's interests into account if they have sufficient reason to do so. The interesting questions, rather, involve defining what those sufficient reasons might be.

Economics focuses on money as the incentive: neoclassical economics asks what goes into a decision-maker's calculus of self-interest. Will that calculus include an appropriate consideration of the costs and benefits that her decision will trigger for *other* persons,[5] not just herself? If the prices the individual expects to pay (and the profits she expects to reap) are equal to society's costs (and benefits), then choices an individual makes to serve her own interest will also serve society's interests.

However, as we know, private and social effects may diverge widely. Economists use the term "externality" to identify the divergence. Lawyers too have come to use the concept of externality to help describe why some privately motivated decisions fail to serve social ends.

An externality is basically an effect that a decision-maker is not taking into account. It refers to some gain or loss that her actions *could* bring into being—but to which she is indifferent because it does not affect her personally. A driver who speeds through an intersection presumably is treating the risk to the pedestrians as an externality.

Conversely, an effect is said to become "internal" to an actor when something brings the impact of what she does home to bear on her. When effects are internal, private and social costs come into alignment, and the private decision-maker will reach decisions that serve society as well as herself. Thus, for example, negligence law tells the driver that she will have to pay if her speeding causes injury to a pedestrian. It thus internalizes the risks that her speeding imposes on others, giving her a private incentive to balance those risks against the thrills and benefits of arriving quickly at her destination. As a result, she may drive more carefully. A similar possibility of external costs arises as to a factory owner whose profitable activity causes pollution.

What tort and nuisance law are supposedly about is undoing the actor's indifference to such negative externalities—you might say it internalizes the externalities to the actor. Tort law can make the person who drives carelessly or the factory owner who pollutes take into account the costs she imposes on others. The internalization occurs because, if the actor drives too or pollutes too much, those injured can sue, and the actor will have to pay to cover the injuries she has caused. The victim's injuries become the actor's losses. Tort law, of the familiar kind from first-year law classes, is about internalizing negative externalities.

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justice would support. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535-40, 1565-1609 (1993).

5. As is further discussed below, it is usually not necessary or desirable for *all* effects to be internalized to one actor.

What is copyright? It allows authors to control certain uses that other people make of their work.[6] Through this device, copyright seeks to ensure that the benefits others reap from works of authorship will not be "external" to authors' decisions to invest in creativity. In many ways, therefore, copyright is a mirror image of ordinary tort law. As tort law internalizes negative externalities to make an actor reduce or stop his harm-causing activity, copyright law internalizes positive externalities to make an actor increase or continue his beneficial activity.

Instead of worrying about people driving too fast or people pushing their factories beyond the capacity of filtration systems, the goal in copyright arises from a concern that people are not creating *enough*. Just as internalizing negative externalities can slow damaging behavior, internalizing positive externalities can increase productive behavior. Copyright law allows people to capture benefits they generate. In copyright law, "carrots" are given to plaintiffs to make them produce more creative works. In tort law, "sticks" are imposed on defendants to make them engage less in destructive behavior. In this way, torts and copyright mirror each other, operating in ways that are parallel but reversed.

You may object to this notion of reversal on the ground that a copyright defendant, like a tort defendant, will feel the law as a "stick" rather than a "carrot"—after all, both defendants have to pay if successfully sued. But from an economic perspective, the focus in copyright policy is not on discouraging the defendant. A copyist who publishes a cheap but unauthorized version of a copyright owner's book is not necessarily imposing a social cost. In fact, the inexpensive version of the book reduces the public's cost of obtaining information, and thus speeds dissemination. Standing alone, copying is a social good. What makes copying bad, from an allocative perspective, is its potential for interfering with the copyright owner's incentives, its impact on the flow of rewards that would otherwise flow back to the author or her assignee and induce the author to continue investing in creative effort.

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6. The core of copyright appears at 17 U.S.C.A. section 106. The section provides that:
   Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
   (1) to reproduce the copyrighted work in copies or phonorecords;
   (2) to prepare derivative works based upon the copyrighted work;
   (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
   (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
   (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
   (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
   17 U.S.C.A. § 106 (West 2003).

So far we have identified several mirror-like reversals:

- Personal injury law focuses on deterring *harms* that are not cost-justified, while copyright law focuses on encouraging *benefits* that are worth more to the public than they cost;
- Personal injury law focuses its incentives on changing the behavior of *defendants* (injurers) while copyright law focuses its incentives on changing the behavior of *plaintiffs* (copyright owners);
- Personal injury law primarily uses *sticks* while copyright primarily uses *carrots*.

Enough of reversals; what of the underlying parallels between tort and copyright? Negligence law here, too, has several important lessons for students of copyright. One involves factual causation; a second involves "relative fault"; and a third involves foreseeability.

Consider first the so-called "copying" element in the cause of action for copyright infringement. Its origins lie in the tort notion of factual causation.

In personal injury law, the plaintiff must ordinarily prove that the defendant's behavior in fact contributed to the harm. The plaintiff will lose if the jury thinks the harm would have occurred even if the defendant's bad act had never occurred. For example, consider this classic example: someone drowns by falling off a tour boat. His estate sues on the basis that the boat's life preservers had been negligently under-inflated. If no one saw the passenger fall off the boat—if there was no one to throw him a life preserver—then the lack of air in the life preservers is irrelevant. Poor maintenance of life preservers is also irrelevant if someone saw the passenger fall and threw him a life preserver, but the passenger had already sunk like a stone. In either case, the defendant tour-boat company will not be held liable for faulty maintenance of its safety equipment. In such cases, there is said to be no "cause-in-fact," no "but-for" connection between the defendant's behavior and the plaintiff's harm.

The parallel to "but-for cause" in copyright law is the notion of "copying": in a copyright infringement suit, the plaintiff author must prove that the defendant in fact made use of the plaintiff's work.[7] If the defendant had no access to the plaintiff's work, that would be like the negligence example where the under-inflated life preserver was never thrown: factual connection is lacking. Similarly, if the copyright defendant had access to the plaintiff's work but did not use it, that is like an under-inflated preserver being thrown but arriving after the victim had sunk: again, the factual connection between the plaintiff and the defendant is lacking.

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7. Note that the causation element is *separate* from the wrongfulness element. In negligence law, the plaintiff must both show causation and carelessness. In a copyright action, similarly, the plaintiff must show both copying *and* that enough expression was copied to constitute a wrongful appropriation. *See* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), *cert. denied* 330 U.S. 851 (1947) (stating that "[i]f copying is established, [in a copyright infringement action] then only does there arise the second issue, that of illicit copying (unlawful appropriation)."). Too often, students and even judges conflate the question of copying with the question of whether the defendant copied so much as to be wrongful.

In short, the plaintiff will lose if the jury thinks the defendant's work would have looked and sounded the same even if the plaintiff's work had not existed. Without the factual contribution of the plaintiff's work to the defendant's benefit, the cause of action for copyright infringement fails.[8]

Personal injury law can also help us understand why copyright law has limits, such as the rule that only "expression" and not "ideas" can be controlled by the copyright owner.[9] Tort law, too, does not order complete internalization. Just as "It takes two to tort"[10] (victim and injurer), it also takes two to make a work of art valuable (author and reader). In fact, to maximize value from a creative work routinely requires even more participants, such as interpreters, critics, and follow-on innovators. Too much control by any one party (like putting all responsibility on one party) can mute the incentives that other parties need.

The reality of interconnection thus creates a central policy problem for both copyright and tort law. Consider the role of relative fault in tort law. If all damages are internalized to defendants, potential plaintiffs might grow careless. The law seeks to avoid such moral hazards by use of doctrines such as contributory negligence and, more recently, comparative negligence. These defenses, along with the requirement that plaintiffs be able to prove that the defendant was at fault,[11] assure that significant incentives remain on the potential victims to take care of themselves.

Just as a plaintiff's fault can reduce or eliminate his ability to collect damages in personal injury cases, in copyright there can be allocation between the parties. An infringer need not pay to a plaintiff all the profits that the defendant has reaped by adapting the plaintiff's work and selling it to a new audience. The amount he must pay can be reduced by the extent to which the defendant's success can be attributed to his own creativity and investments (i.e., what he has not borrowed from the plaintiff).[12] Just as negligence law recognizes that *both* driver and pedestrian can contribute to a harm occurring, copyright law recognizes that beneficial contributions can be made by *both* an initial author and a second author

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8. Under patent law, even a coincidental replication by an independent inventor can infringe. Thus, unlike copyright law, patent law has no requirement of "cause-in-fact." Nevertheless, patent like copyright seeks to encourage creative activity by assuring that some of an invention's proceeds will flow to someone who has invested in its creation.

9. 17 U.S.C.A. § 102(b) (West 2003).

10. I first heard this apt phrase from Dean Saul Levmore.

11. Also note that it is primarily in areas where plaintiffs cannot effectively guard themselves (such as product liability law) that plaintiffs do not have course to prove that a defendant was at fault.

12. *See* 17 U.S.C.A. § 504(b) (West 1996).

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Id. As an alternative, the plaintiff has the option of claiming statutory damages. *See id*. § 504(c).

who "stands on the shoulders" of the first. To internalize everything to one party creates a new set of externalities for the other party.[13]

Let us consider one final parallel. According to the U.S. Constitution, Congress may only give authors rights that last a "limited [t]ime[]."[14] Copyrights, therefore, have a limited duration. Some observers see this as an anomaly: they ask, why should an intellectual property right expire when a "fee simple absolute" in land can last forever? The tort doctrines of proximate cause and foreseeability can help us understand the answer.

Begin with the following negligence hypothetical. You are walking down a hallway when a friend negligently trips you. You fall, rise, brush yourself off, yell at your friend to be more careful the next time, and graciously accept your friend's abject apology. Unhurt but delayed, you continue on your way. You reach your car five minutes later than you otherwise would have. As you begin to drive out of the parking space, a rotting tree falls on your car, breaking your arm. Had you arrived five minutes earlier, the tree would have missed you. Can you sue your friend for the broken arm, since her negligence is indeed a cause-in-fact of your injuries? You may sue your friend if you wish—but you cannot win.

The nomenclature describing the reasons why you would lose will vary. Some courts will say that your friend's tripping you was not a proximate cause of you falling victim to a tree. Other courts will say that, from the perspective of a reasonable person standing in your friend's shoes back in the hallway, the danger from the tree was not foreseeable. Yet other courts will say that your friend had no duty to protect you from falling trees. Whatever the language, the courts are saying the same thing: imposing a duty on individuals to be careful to avoid tripping each other will have no impact on reducing the number of people injured in cars by falling trees. Having the law force an internalization that has no impact is wasteful.

Now turn to copyright, and the constitutionally-mandated command that copyrights can only last for limited times. In two hundred years, all of today's copyrights will have expired. That is, an heir of a copyright owner who sues for nonconsensual copying two hundred years from now will lose. Why? The logic is the same as in the tort case of no foreseeability. Imposing a duty on a copyist to pay royalties two hundred years after a book or movie is created will have no impact on an author's willingness to work hard today. Given discount rates and the difficulties of predicting that far in the future, the expectation of current benefit from such a far-distant right is minuscule, virtually unforeseeable.[15] To impose liability would be to raise the price of books above the physical cost of manufacturing and

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13. If the two can bargain, however, then costs and benefits have the potential of being internal to *both* parties. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Nevertheless, where transaction costs or other difficulties impede bargaining, a legal duty that puts all costs or benefits on one party leaves the other with inadequate incentives to engage in efforts that are socially desirable.

14. U.S. CONST. art. I, § 8, cl. 8.

15. The current copyright term (which lasts generally for the life of the author plus seventy years) is already too long for appropriate incentives. *See* Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOYOLA L.A. L. REV. 159, 182-97 (2002), and sources cited therein. Nevertheless, the Supreme Court recently upheld the long term against Constitutional attack. Eldred v. Ashcroft, _U.S._, 123 S.Ct. 1505 (2003).

distributing them for no incentive payoff. This not only wastes administrative costs (as imposing liability for unforeseeable harms also would do), but also imposes a deadweight loss on society. So plaintiff loses.

In the law of personal injury, a defendant need not pay for a harm unforeseeably (and thus not proximately) caused. This rule makes sense because, if this were not the rule, the court would be expending its resources to make the defendant pay when the obligation would have no incentive effect. In the law of copyright, copyright terms expire. If that were not the rule and copyrights were perpetual, copyright law would make defendants pay at times so far distant that the prospect of such payment would not add anything to the original author's incentives to create new works, but would decrease the dissemination of information.

I do not want to overstate the parallels between tort law and copyright. But the general outline is clear: tort law internalizes bad effects to decrease carelessness, and copyright law internalizes good effects to increase productivity.

There is one last challenge I suspect some of you are thinking about. I have argued essentially that tort law expresses a sort of spirit of the common law, a spirit which says we want to internalize externalities. We want to internalize both good externalities, like the benefits of creating, and bad externalities like the costs of carelessness. If that is my thesis, you might object that the purported common-law preference for internalization does not square with the rule of law in restitution.

Restitution is the common law of benefits. One basic rule of restitution is that, if someone provides a service for another without a prior arrangement, the benefactor cannot sue for payment after the fact. It is called the "officious intermeddler rule." Assume you go away for vacation, and when you come home, you find that you have a beautiful new coat of paint on your house. You did not order it. Do you have to pay for it? No, says the law. It is true that an intermeddler gave you a benefit. Your house is now worth a little more than it was before. But you do not have to pay; the person who painted your house without a contract is an intermeddler without the right to sue.

Is there an inconsistency between copyright and this common law doctrine that cannot be explained? The challenge is that, in restitution law, people who volunteer to give other people benefits cannot use the law to force compensation after the fact. The painter must go to the homeowner and say, *in advance*, "Would you like your house painted, sir?" He needs a contract. Without a contract, the house painter or other intermeddler cannot require payment. Yet copyright law adopts an opposite approach.

In intellectual property law, if an author or inventor makes something that is beneficial and voluntarily sends it out into the stream of commerce, he is not considered an officious intermeddler. The author can use copyright law to stop people from making copies even though he has no contractual agreement with those whom he is stopping from making a productive use of the original work. The law gives him leverage to extract payment that it does not give to the house painter. This is one of the puzzles that *Of Harms and Benefits* seeks to solve. The article suggests that the answer lies in encouraging markets to form. In the law of

restitution, a rule that benefactors cannot sue encourages contracts. In copyright law, contracts are encouraged by a rule that benefactors *can* sue. In each instance, the law adopts the rule that encourages internalization by contract.

We see the difference in the example just canvassed. The burden on the house painter to make a contract is small. If he wants to be paid, he goes up to you and says, "Would you like your house painted?" By contrast, the burden on the author to obtain payment without a legal right would be much higher. Too many potential customers may refuse to pay, free-riding in the hope that others will pay the author and that the material will become available for free. As a result, it may not become available at all. If, however, the author has a legal right to stop others from copying, an individual publisher can come to the copyright owner and, with efficacy, bargain for a right to print. Strategic behavior is far less demanding and transaction costs are much lower when an author has rights than when she does not.

In summary, I think we can learn a great deal from comparing copyright law and its common law brethren, torts and restitution. By comparing copyright with torts, we can see how the internalization process works, and some of its limits. By comparing copyright law with the law of restitution, we can see how differential behavioral patterns can give rise to different legal rules.

Nevertheless, the analogies have limits. Personal injury law and copyright law should not be perfectly symmetrical. A generation of behavioral research suggests that people care about *context.*[16] Harms and benefits do not exist in the abstract as numbers differentiated only by a plus and minus sign. The analysis in *Of Harms and Benefits* should not be taken to indicate that the two must be treated the same for all purposes.

As Ronald Coase emphasized in *The Problem of Social Cost*, legal duties are not the only way to achieve internalization.[17] Morality, empathy, propinquity and payment all play important roles in creating human incentives, and they clearly will play differing roles in different circumstances. Even among copyright holders, motivations and industry patterns differ. It is hardly likely that authors and harm-causers need precisely the same kind of legal interventions.

Perhaps most importantly, the exchange of non-compensated benefits breeds community in a way that the exchange of non-compensated harms might not: gratitude is often an easier emotion to achieve than forgiveness.[18] In many ways, then, using the law to internalize harm is *not* an appropriate precedent for using law to internalize benefit. The particular needs of creative communities and those they serve present a complex research agenda for the future.

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16. *See, e.g.,* CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., Cambridge U. Press 2000); *see also* Symposium: *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075 (2003).

17. Coase, *supra* note 13.

18. For my preliminary observations on this topic, *see* Wendy J. Gordon, *Intellectual Property, in* OXFORD HANDBOOK OF LEGAL STUDIES 617, at 643-45 (Peter Cane & Mark Tushnet, eds., Oxford U. Press 2003).

Of Harms and Benefits: Torts, Restitution, and Intellectual Property*

Wendy J. Gordon**

I. INTRODUCTION

Copyright and patent take the form of ordinary property. As tangible property has physical edges, intellectual property statutes create boundaries by defining the subject matters within their zone of protection. As real property owners have rights to prevent strangers from entering their land, intellectual property statutes grant owners rights to exclude strangers from using the protected work in specified ways. As tangible property can be bought and sold, bequeathed and inherited, so can copyrights and patents.[1]

But does this similarity of form mask an inconsistency of function? Justifications for tangible property typically refer to the internalization of both positive and negative effects, but justifications for intellectual property tend to be more one-sided. Legal protection for intellectual products is based on the benefits the producers generate: from a fairness point of view it is argued that persons who create works of value deserve to be paid for the benefits generated,[2] and from an economic point of view it is argued that desirable incentives are provided by allowing creators to capture (internalize) some share of the benefits they create.[3] Because intellectual products can be infinitely replicated without necessarily depriving their creator of possession, their economic key is the provision of positive rather than negative incentives: copying is not in itself

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* This article appears as originally printed with the exception of the author's biographical footnote (see *infra* note **). *See* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUDIES 449-82 (1992). Photocopies for classroom use permitted.

 Now Professor of Law and Paul J. Liacos Scholar in Law at Boston University, at the time of this article's initial publication I was Professor of Law at Rutgers Law School/Newark and Visiting Professor of Law, University of Chicago Law School. I am grateful to the S.I. Newhouse Faculty Research Fund of the Rutgers/Newark Law School, which provided research support for this project. For helpful comments I would like to thank Bruce Ackerman, Richard Epstein, Russell Hardin, Doug Laycock, Jim Lindgren, Jessica Litman, and Ed Wise, as well as the participants in workshops where this paper was presented: the Law & Economics Seminar of the Georgetown University Law Center, and the Shipman & Goodwin Faculty Colloquium at the University of Connecticut Law School. I also appreciate the hospitality furnished me during early stages of this article's preparation by the Wayne State University School of Law and its then Interim Dean Robert Abrams.

1. For a Hohfeldian comparison between the entitlement packages that comprise tangible and intangible property, see Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 Stan. L. Rev. 1343, 1354-88 (1989).

2. The fairness argument works better for copyright than for patent. In copyright only copying—the use of a beneficial work originating with another—is actionable, while in patent even an independent and coincidental replication of a patented invention is actionable by the patent holder.

3. The incentives for the creation of new work provided by an intellectual property system must be weighed against the deadweight loss and administrative costs of the system; the economic goal is to obtain the highest net sum. William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 326 (1989). How to achieve that precise balance is outside the scope of this article.

something to discourage, any more than additional use of a classic non-congested public good such as national defense should be discouraged. Uncompensated use of an inexhaustible good is worth discouraging only as a means to an end: obtaining adequate incentives for the good's initial production and maintenance.

The traditional patterns of judge-made law much more easily provide negative incentives than positive incentives. Duties to guard against harm are far more common than duties to provide or pay for benefits. Tort law flourishes, while restitution law remains a virtual backwater[4]—an area where benefits rendered by mistake, or as the result of a failed contract, or in an emergency can sometimes be sued upon.

I have briefly argued elsewhere that the core of intellectual property—a grant of rights over benefits—is consistent with the common law's pattern of entitlements.[5] But, given the dissimilarity with which judges have treated harms and benefits, negative and positive incentives, is that correct?

Some of the differential treatment of benefits might be explained as due to the judiciary's consciousness of its own institutional limitations[6]—an approach which could render many of the common law denials of recovery irrelevant to statutory intellectual property. I have in fact elsewhere suggested that the legislature seems better suited than the courts to craft rights over benefit-generation.[7] Nevertheless, the common law pattern may suggest that encouraging the generation of benefit may pose special difficulties that go beyond the questions of institutional competence. Accordingly the instant article puts aside the issue of comparative institutional competence to examine whether the judicial doctrines evidence *substantive* choices that should caution against even legislative pursuit of benefit-production in the intellectual property area.

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4. Note, however, that some instances of restitution may be invisible because of an overlap with tort or contract. See Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1283 (1989). In addition, the provision of positive incentives in traditional law may be partially masked by a survey of caselaw; tangible property works to internalize both positive and negative effects, and the basic allocation of tangible property has not primarily been a judicial matter.

5. See Gordon, An Inquiry into the Merits of Copyright, *supra* note 1, at 1446-59 (exploring competing baselines, and concluding that a noncontractual entitlement to be paid for what one's labor produces is consistent with a basic pattern in restitution doctrine). Also see Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 Va. L. Rev. 149, 166-265 (1992) (examining corrective justice and restitution; concluding that both support an entitlement to be paid for one's labor, though the resulting entitlement is weak, conditional, and limited). Note that I will use "common law" to mean judge-made law; unless the context suggests otherwise, the usage will thus embrace cases decided both at common law and equity.

6. Providing rewards for benefits can pose dangers to competition that a court—with its two-party focus and limited sources of information—may be ill equipped to assess. See e.g., Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 ("[W]e are not in any position to pass upon the questions involved"; "records prepared by litigants . . . cannot disclose the conditions of this industry, or of the others which may be involved").

7. See Gordon, supra note 5, at, for example, 151 n. 4, 259 n. 419, 272 & 281 (suggesting that legislators are better able than courts to provide the advance specification of boundaries that is crucial to a socially beneficial system of intellectual property.)

From an abstract perspective, there would seem to be little reason for harms and benefits to be treated differently. Decades of cost-benefit analyses suggest that the two categories are interchangeable: reducing by one dollar damage that would otherwise occur is equivalent to providing a dollar's worth of new goods or services. The labels are themselves variable. One can verbally transform most benefit questions into "harms" and vice versa by juggling the baseline from which effects are measured. For example, this article defines harms and benefits using the status quo as a baseline, and under that definition benefits are obviously key to intellectual-product regulation: looking forward in time, intellectual-product producers may lack any markets capable of being "harmed" unless they are first guaranteed some form of legal protection for the benefits their works generate. Yet one might instead argue that the proper baseline for copyright is the exclusive right over copying it gives authors; under such a definition even copying which does not interfere with an authors' markets could count as a "harm" and, by verbal legerdemain, benefits would be cast out of the picture.[8]

Yet for all their malleability, the two terms are not interchangeable. Once a stable baseline is chosen, the terms "harm" and "benefit" will indicate different phenomena. Notably, the common law usually employs the status quo as the baseline from which harm and benefit are measured. Adding to what already exists is different from taking from it, and it is plausible that each would entail different functional considerations which the makers of intellectual-product law would be unwise to ignore. For example, common-law cases might reveal that transaction costs are much more expensive or liability rules more strained when the issue is giving positive rather than negative incentives. Or if the judges reveal a disinclination to order payment for benefit, and that disinclination is not explainable in functional terms, that might lead to a useful reevaluation of the normative proposition that creators deserve some reward for their effort.

This article examines the reasons for the apparent disinclination of judges sitting in common law and equity to order recovery for benefit generation. it concludes that these reasons do not condemn a benefit-based grant of rights in intellectual products.

II. TORTS AND RESTITUTION

A. The Asymmetry Critique

Some observers believe that the common law has treated the internalization of harms quite differently from the way it has treated the internalization of

8. Note that the change of label does not change the underlying issue: the economic reason for granting an author an entitlement capable of being "harmed" has to do in the first instance with the increase in value to which she is in a position to contribute. This article uses the status quo as its baseline of comparison: if the act or omission that is the purported premise for liability adds value from what would otherwise be present, that addition is a benefit; if it subtracts, that is a harm.

benefits. If Harriet erects a reeking cattle feedlot next to Peter's residential neighborhood, for example, Peter will probably be able to obtain damages or an injunction against her, in nuisance. If, by contrast, Harriet builds a luxury resort hotel next to Peter's land, absent contract she will have no legal right to obtain monies from him, no matter how high his land values rise as a result of her development.[9] For injuring her neighbor, Harriet must pay. But for benefiting him, she cannot use the law to demand compensation he has not agreed to pay. As Saul Levmore has observed, "The law appears ready to create missing bargains in tort where harms are concerned, but is reluctant to do so in restitution where benefits are at stake."[10] If the common law is more willing to internalize harms than it is to recapture benefits, then its purported preference for internalization becomes a shaky precedent for intellectual property, particularly for the modern statutory pattern that gives authors and inventors rights that go beyond protection from being harmed in existing markets.[11] If indeed there is a "basic asymmetry"[12] between the way the law treats harms and the way it treats benefits, then intellectual property's place in our overall jurisprudence is potentially precarious.

What follows is an argument that whatever asymmetry exists is attributable not to any per se difference between harm and benefit, but rather to discrete problems that are likely to be absent when payment is sought for the use of an intellectual product.

B. On the Absence of a Duty to Benefit Others.

Consider first an asymmetry in tort law itself. Negligence law imposes duties to avoid unreasonable behavior that could cause strangers harm, yet under the "no duty to aid" rule it generally declines to impose duties to create benefits for strangers.[13] Why does the law not impose liability for a failure to generate benefit, as it does for a failure to take precautions against harm? There are two primary

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9. See Restatement of Restitution, § 1, at 9, illustration (c) (1937).

10. Saul Levmore, Explaining Restitution, 71 Va. L. Rev. 65, at 72 (1985).

11. In the early years of the nation, the copyright statute was quite harm-oriented: it protected authors only against virtually verbatim reproduction. That was progressively altered. In 1870 authors were given rights over dramatizations and translations of their works; later an abridgement right was added. Today authors have "exclusive rights" to prepare and authorize derivative works, 17 U.S.C. 106, not conditional upon their having entered the derivative work market. See Stewart v. Abend, 110 S. Ct. 1750 (1990) (authors free to suppress their work without impairing their copyright) (dicta). Yet traces of the old approach remain, particularly in the fair use doctrine, 17 U.S.C. 107, where absence of economic harm will assist a defendant who seeks to escape liability.

12. Levmore, *supra* note 8, at 72. Levmore does not claim that the difference between harm and benefit per se is responsible for the differing case results. Although I will dispute the way he has articulated his asymmetry observation see section IIIB, *infra*, this article builds on, rather than repudiates, Levmore's analysis.

13. Note that a duty to aid or to create benefits is distinct from a duty to allow a stranger to share one's existing resources. For example, in Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908) a landowner was held liable for his servant's cutting the plaintiff's boat loose when it docked without permission in a storm; yet had the boat worked itself loose, a passing stranger would not have been liable for refusing to assist the plaintiff.

reasons, and they have to do with the appropriate choice of tools ("sticks" versus "carrots") and do not reflect any lack of concern with encouraging benefit-producing behavior.

The first reason is a concern with liberty. Liability for failure to generate benefits for those with whom one has no prior relationship, like liability for failure to act to assist such persons, would be potentially all-pervasive, for one can always do more for those who suffer. Liability schemes premised on harms are significantly more limited in nature for there is much one can do without harming other people. Therefore, liability for failure to generate benefits would pose a greater danger to defendants' liberty than would liability for harm.[14]

The second reason is a concern with practicability. It can be hard to determine what precisely should be done and the particular individuals on whom the duty should appropriately fall.[15] There are a large number of turning points leading to any event, and a large number of persons whose actions could have averted any given harm. What is the baseline from which any one bad Samaritan's shortfall should be measured? It is hard to imagine how his liability might be computed.

Each of these reasons is at work in the area of intellectual products. Imposition of a legal duty to create would have a high cost in terms of liberty. Further, a liability approach[16] to force the creation of new works would likely be wholly impracticable—it is hard to imagine how the law could determine which persons should be penalized for failing to create what new things, [17] or how to measure the benefits that a laggard author has failed to create. The law's unwillingness to impose a "duty to produce benefits" on potential benefactors thus does not indicate any lack of concern with generating incentives to encourage helpful activity or the production of valuable things. Rather, the principle that it is desirable to induce benefits is honored by other means, primarily by encouraging the formation of markets where payments for benefits will be forthcoming.[18] Giving creators a right to payment rather than a duty to

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14. See Richard Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973).

15. The difficulty of identifying a salient defendant is recognized as one reason for the "no duty to aid" rule. Saul Levmore, Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations, 72 Va. L. Rev. 879, 933-39 (1986) (also suggesting that in the future, the need to find an individually salient defendant may have a decreasing importance for no-duty-to-aid jurisprudence).

16. For a more general discussion, see Gordon, *supra* note 1, at 1407-13 (discussion of "mandatory sharing" and other hypothetical liability models for intellectual products).

17. Even if lazy authors could be distinguished from ones with incurable writer's block, the very imposition of liability on proven authors could in the long term discourage new entrants into the field. Compare William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Leg. Stud. 83 (1976) (a duty to aid might discourage potential rescuers from going to locations where rescues are likely to be needed).

18. Intellectual property is, of course, one way of honoring this principle. Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Column. L. Rev. 1600. 1605-14 (1982) (using the market model to explain copyright).

create can generate incentives[19] without the liberty, practicability, and transaction cost problems just sketched.

C. Restitution as an Incentive for Harm Avoidance

The second question to be faced in evaluating the charge of asymmetry is: Why is restitution not substituted for tort law as a general matter? Instead of punishing harm-causers to discourage overly risky behavior, the law could instead hold out rewards for harm-avoidance.[20] Restitutionary rules could allow potential injurers who install special brakes on their cars, put filters on their factory smokestacks, or otherwise incur trouble and expense, to obtain recompense from all the persons who are thereby spared injury.

If a safe driver could obtain payment from pedestrians as a class for the reduction in risk they experience, for example, then drivers' hopes of collecting restitutionary payments might be an effective incentive to take precautions. It might even as effective as is the desire to avoid a liability judgment under conventional tort law,[21] and in any event could be a useful supplement to tort incentives. Further, that way the pedestrians would pay for what they get.[22] Why is this not the pattern that the law generally takes?

One reason is that restitutionary rights based on harms averted would be harder to implement than are tort rights based on harms caused. It is easier for a court to identify, from a limited number of involved parties, one who should be held liable for "causing" a cost,[23] than it is to identify from among the uninvolved

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19. Note however that a principle of internalization is neither self-explanatory nor absolute, even if one restricts one's attention solely to economics. For example, copyright does not seek to internalize *all* benefits to an initial author; rather, it gives her a tool with which to demand a contract price from users, and each party will negotiate to receive benefits from the work. Even when contracts are not possible, it is usually preferable to encourage a creative user by allowing him to keep part of what he earns rather than stripping him to internalize all proceeds to a predecessor whose work he has copied. See generally Gordon, *supra* note 5, at section IIIC (remedies).

20. This would give desirable incentives and also work toward spreading: the costs of paying to avoid risk would be borne by all those benefited.

21. Persons who now drive carelessly can hope to be lucky enough to avoid an accident. But if a driver could practicably sue for payment when he or she is careful, every act of carelessness would be costly in terms of receipts foregone. See Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). On the other hand, people may not respond to opportunity costs in the same way they do to out-of-pocket payments, risk aversion might give a psychological "boost" to the tort incentive system, and transaction costs might be likely to block suits seeking payment for benefits, since the benefits are likely to be fairly small in individual amount and the defendants are likely to be very large in number.

22. Although it may be economically desirable to force the "cheapest cost avoider" to take precautions, it is less clear why such a person should not be paid for doing so. It is true that some actors deserve neither Paretian deference nor compensation; a thief who is forced to give up his spoils, for example, would seem to have little ground for complaint. See Jules Coleman, Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law, 68 Cal. L. Rev. 221 (1980). But a person who takes action to reduce harm does not seem an obvious candidate for Kaldor-Hicks treatment.

23. Investigating who was factually linked to a particular accident can yield a short list of persons from which one or more can be chosen, via "rough guess" or otherwise, as the person on whom liability should be placed to avoid such accidents in the future. See Guido Calabresi, The Costs of Accidents 140-43 (Yale, 1970).

public at large who should be paid to avert a potential cost. It is also easier to make one party pay than to make a large group pay.[24]

Additionally, work in the economics of transaction costs has suggested that rewards and subsidies, *not* liabilities and taxes, are the most efficient methods of encouraging the production of benefits.[25] As Donald Wittman argues, in regard to risk-creation people behave reasonably more often than not. It is expensive to reward everyone for behavior they ordinarily should, and ordinarily would, engage in. Requiring those who benefit to pay for all such reasonable acts would make necessary a great many more court cases than would an opposite rule that merely requires the unreasonable actor to pay.[26] In addition, it is hard to decide what should be the relevant baseline from which this reward should be computed.[27]

Further, requiring potential victims to pay for any precaution taken on their behalf, and allowing potential injurers to collect monies for any precaution they care to take, would create a species of forced purchases. People cannot afford to buy everything they might like to have,[28] including protection from harm. Being forced to pay for something one wouldn't have purchased is a harm, even if one is required to pay no more than fair market value for it.[29] And if the good-doer is a volunteer, the question will always remain (given the real-world inadequacy of factfinding) whether the unrequested action was indeed beneficial.[30]

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24. Even if appropriate candidates for suit could be identified, transaction costs could discourage resort to this remedy. Each defendant might proffer particularized reasons why he should not have to pay, based on his physical position at the moment the precaution was taken, which could require an expensive degree of individualized adjudication.

25. Donald Wittman, Liability for Harm or Restitution for Benefit?, 13 J. Legal Stud. 57, at 61, 62-64, 71-72 (1984) suggesting that a liability or "stick" approach is the best way to treat the generation of negative externalities (harms) and that the restitutionary or "carrot" approach tends to be preferable for dealing with the generation of positive externalities (benefits). Also see Levmore, *supra* note 13, at 879, 933-39 (examining the mix of "carrots" and sticks" in the duty-to-aid branch of tort law).

26. Wittman, *supra* note 23, at 62-64.

27. Wittman usefully notes that requiring potential victims to pay for harm not inflicted would involve measurement problems and consequent information costs far in excess of those involved where injurers must pay. *Id.* at 62-65. If potential victims must compensate an injurer for efficient behavior, he argues, there may be no way to decide what level of inefficient behavior to measure from; the law would be "trying to measure with a yardstick that is hard to see at one end." *Id*. at 64.

28. See Levmore, *supra* note 8.

29. See Peter Birks, An Introduction to the Law of Restitution 109-111 (1985) ("Market value is not [the recipient's] value"); also see Levmore, *supra* note 8. It might be argued that this is not a significant problem because one can always sell the unrequested item. However, selling the item will involve transaction costs; in selling the item, an individual lacks the market avenues and reputation with the public that an established dealer can rely on, and thus may have to sell the item for less than fair market price; and the benefit is often inextricably tied to something the recipient cannot sell, like an unsolicited paint job on one's house. Besides, if the item were easily saleable, the "donor" would probably have found it cheaper to sell it than to litigate.

30. This very doubt is part of the reason why the term "do-gooder" has a somewhat negative connotation in ordinary parlance.

In addition, this hypothetical restitutionary equivalent of tort law, whether conceived of as a substitute for tort law or as a supplement to it, would be inconsistent with the underlying entitlement patterns of the common law. Unreasonably causing people harm is usually considered wrongful.[31] Allowing potential harm-causers to extract payment merely for behaving like reasonable people is normatively offensive. Some philosophers have suggested that one should *not* be entitled to claim a right of payment for doing those things that one is morally obligated to do.[32]

Perhaps most importantly, paying people to refrain from doing harm is likely to encourage precisely the wrong sorts of behavior. Otherwise moral people might (inaccurately) infer that one has no moral obligation to do the right thing unless one is paid.[33] Immoral people, on the other hand, might (accurately) infer that they can benefit financially by threatening harm to others. The possibility that the rule might erode conventional moral strictures, and in so doing decrease the amount of voluntary good-doing in the world,[34] is troubling. Even more troubling is the likely effect on people who do not even attempt to comply with moral strictures.

A right to payment for harm avoidance would give an incentive for extortion.[35] The vicious or greedy might threaten harm in the hope of being paid to restrain themselves. Not only would that inappropriately redirect income from productive persons to successful extortionists, and encourage wasteful expenditures on self-protection,[36] but it could also invite violence. To make credible a claim that one is capable of imposing harm, one may need occasionally to demonstrate one's capacity to injure.[37]

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31. See the discussion of the common law duties to refrain from doing harm in Gordon, *supra* note 1, at 1361-65.

32. See, for example, Lawrence C. Becker, Property Rights: Philosophic Foundations 41-42 (1977). Compare the doctrine in unjust enrichment law that no restitution is due for fulfilling a preexisting duty. Restatement of Restitution, *supra* note 7, § 60 (no restitution for fulfilling a legally enforceable duty); also see ' 61 (effect of moral duty on restitution).

33. Something the law permits may gradually come to be regarded as morally permissible as well; for example, divorce. Similarly, something the law rewards may gradually come to be regarded as something that only needs to be done when one is paid. Tracing cause and effect in such cases is difficult.

34. It is also possible that the availability of payment might take the "fun" out of doing good. Landes and Posner have suggested that it would be difficult to feel altruistic and noble if good deeds always created a legal right to payment—and that payment might therefore discourage the doing of good deeds. See Landes & Posner, *supra* note 15.

35. For further treatment of how the potential for extortion bears on the appropriate allocation of property rights, see Harold Demsetz, When Does the Rule of Liability Matter? J. Legal Stud. 13 (1972). Also see, for example, Levmore, *supra* note 13, at 886-89 (discussing the "moral hazard" that might result if rescuers were legally entitled to receive rewards).

36. See Ronald Coase, The 1987 McCorkle Lecture: Blackmail, 74 Va. L. Rev. 655, 672-74 (1988) (blackmail involves wasteful expenditures).

37. Wittman is curiously unconcerned about the possibility of extortion, perhaps because he has focused on conflicts between legitimate resource uses, such as ranching and farming, factories and homes. Although there are some hints that he may be concerned with giving improper incentives toward extortion, his examples in this regard seem oddly far off the mark. See, for example, Wittman, *supra* note 23, at 65 n.25 ("If we reward

These reasons, and not a disinclination to encourage or reward benefit-production, account for the law's usual refusal to order recipients to pay for others' efforts to protect them from harm. The few instances where the law has chosen a different course tend to prove that these are the reasons for the general no-recovery rule.

Consider the famous case of Spur v. Del Webb.[38] In *Spur*, an injunction in favor of someone benefiting from the cessation of a nuisance was conditioned on the beneficiary's reimbursing the operator of the harmful enterprise (a naturally odiferous and insect-drawing cattle feedlot) for the costs of relocation or shutting down. That is, the owner of the feedlot was paid to eliminate his own harm-causing activity.[39] The party required to pay was a developer who had deliberately located a senior citizen residential development within scent of the previously isolated feedlot.

This case suggests that granting a restitutionary right of payment for harm-avoidance may be appropriate in cases free of the dangers we have just canvassed. First, the absence of extortionate motive on the part of the *Spur* defendant was clear: the feedlot owner had not built his lot to force developers to pay him to shut down. Second, it was a person with the moral advantage who was required to cease his activities. Though the feedlot was the source of the physical harm (noxious smells), its owner had a position of moral superiority to the developer. The location of the residential development was unexpected in light of the prior path of the city's development,[40] so the defendant had not acted improperly in locating his business. As for the developer, he had deliberately created a conflict between his customers' needs and Spur's—" tak[ing] advantage of the lesser land values"[41] and then suing to remove one of the reasons for the land's low price. Thus, though the feedlot was the source of the physical harm. Third, the court's unusual remedial structure provided a cure for the

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everyone for not robbing $3 million, then there are high transactions costs; if we reward only armored car guards, then there are improper incentives to become an armored car guard. . . .") Perhaps his examples, and his refusal to discuss the extortion issue directly, were intended tongue in cheek; however, the short shrift which Wittman gives to "justice" considerations in the land use context (see *id*. at 65 and n.26) suggests he may mean this approach seriously.

38. Spur Industries, Inc., v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972).

39. The court in *Spur* recharacterized the source of the damage: rather than focusing on the fact that the smells "cause" damage to the homeowners in the physical world, the court notes that the developer's enforcing an injunction would "cause" damage to the feedlot owner. See *Spur* at 108 Ariz. 186. This characterization provides an illuminating perspective on the much-bedeviled question of what should constitute "causing harm" in tort law. Although the court seems to be liberating" causing harm" from usual notions of physical sequence, compare Epstein, *supra* note 12, it does not seem to view "cause" as a concept that can flow equally easily in any direction. For this court, assignment of "cause" seems to be linked with the moral or entitlement status of the parties' actions.

40. The court noted that ordinarily the developer's suit would have been defeated by the "coming to the nuisance" doctrine, but that since many parties other than the developer would be harmed by the noxious odors (notably, the residents of the new homes), an injunction against the feedlot would be conditionally granted.

41. *Spur*, 494 P. 2d 708. As the court notes, the developer had "brought people to the nuisance to the foreseeable detriment of Spur. . ." *Id*.

valuation problem. If the developer had any doubts that the reduction in noxious smells was "worth it" to him, he was not required to pay; he could choose not to enforce the injunction. Thus the extortion, morality, and valuation problems were absent—and the court did not apply the usual rule of no-payment-for-harm-avoidance.[42]

One sees the same pattern operating in more mundane areas. Bottle-deposit laws amount to paying people for not littering and therefore appear to be an exception to the rule that people have no legal rights to be paid for harm-avoidance. Yet a law that requires grocers to pay people for bringing back empties is different from a general rule that would allow people to claim payment for not littering, and the differences lie in the areas we have already identified: incentives for extortion, administrability, effects on morality, and potential for harm.

There is no potential for extortion: one's ability to litter is limited by one's willingness to spend money to purchase bottled drinks. Such schemes also lack the administrative problems that a general payment-for-harm-reduction rule would involve. The baseline is clear, and there is no problem with duplicative efforts; an empty can be brought back only once.

Further, since one can collect only for bottles that have been previously purchased, the bottle-deposit laws have minimal, if any, erosive effect on the legitimacy of demanding proper behavior as of right.[43] Were the law to reward all non-littering, by contrast, children might insist that their parents pay them for picking up after themselves on the ground that "the government pays you for not littering, so on the same principle you should pay me."[44] As for the possibility that the required payment will exceed the value of the benefit to the recipient, and thus cause harm, the bottle-deposit laws circumvent this difficulty by making the potential litterer provide most of the funds.[45]

In short, there are many reasons why the law generally refuses to order people to pay when others reduce their risky or harmful activities: administrative difficulties, normative inconsistencies, incentives for extortion, and doubts about the value to the recipient of the purported risk reduction relative to the price he

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42. For an alternative explanation of *Spur*, see Donald Wittman, First Come, First Served: An Economic Analysis of "Coming to the Nuisance," 9 J. Legal Stud. 557, 566 (1980).

43. Admittedly persons other than purchasers can bring in bottles, but note that the payments they collect are not for mere proper behavior. When someone collects the bottles lying in the stands after a football game and takes them to a store to collect the deposits, he is paid not for refraining from harm (mere proper behavior), but for undoing the harm that *others* have done. The prospect of reward has thus given him an incentive to provide an affirmative benefit.

44. Paying people to do what is morally required may not always undermine their sense of moral obligation. Sometimes children who are paid for getting good grades or for cleaning their rooms thereby learn to do those things without payment.

45. Someone who buys a bottled drink is required to leave the grocer some extra money as a deposit, which the grocer will pay to those who return bottles. Grocers and drink manufacturers also may bear some of the cost; the grocer may need extra staff or physical space to deal with bottle returns, and since bottle deposits will increase prices, it is likely that bottle-deposit requirements will reduce sales.

might be required to pay. When these dangers are absent, the rule barring recovery for harm avoidance tends not to apply.

Much of the intellectual property area is free of the dangers that caution against awarding restitution. First, the extortion dangers are absent. Many normative views converge in suggesting that there is no extortion in giving creators a right to be paid for the benefits they give others,[46] and the effects of such a right are far different from those of extortion: such a right shifts income in ways that increase rather than decrease productivity. Second, administrability problems are lessened. It is not difficult to identify who is best able to render a benefit when that benefit is a creative work that the defendant is already utilizing:[47] the creator of the benefit has already identified herself by making the work. Further, the parties benefited are not the whole world, or some unidentifiable group. The infringer is fairly readily identified.[48] The class of potential defendants and potential plaintiffs is thus limited.

Provided that the subject matter of the protected work is sufficiently marked off to give the user fair notice that employing it will trigger an obligation of payment, and provided that the user's motivations are commercial, valuation is unlikely to cause difficulties. While the creator may be a volunteer in the sense that no one may have asked him or her to create, it is up to the user/infringer to decide whether or not to use the work. At that stage, the commercial user's decision indicates that the user thinks the work beneficial and the user can then bargain with the creator for an appropriate price.[49]

The user will also find it more difficult to object on the basis of "forced purchase" or coercion than would the recipient of a harm-avoidance effort. True, the user of an intellectual product might argue that he is being forced to choose between paying for the work and doing without. However, the benefit-creator has added that choice to the user's relevant range of choices (unlike those extortionists who say, "pay me or I'll take away something you already have"), and it is a contribution she probably was not obliged to make.[50] So although coercion in the form of forced purchase is still present, the coercion is of a less troubling sort. That

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46. See for example Gordon, *supra* note 5 , at section I (arguments from corrective justice).

47. Note that although one of the purposes of intellectual property law is the maintenance of ab ante incentives, the rules it sets up can operate only *after* something has been created.

48. For cases in which it is the much of the world that benefits, and where the transaction costs of identifying who benefits would therefore be astronomic, the law tends to conclude that there is no intellectual property, just as it says there will be no restitution in general cases exhibiting that characteristic. Thus, it may be that the law does not give ownership rights in general ideas and discoveries (such as the discovery of gravity) in part because of the high transaction costs that would be involved in tracing the effects of such basic "building blocks." Compare John Dawson, The Self-Serving Intermeddler, 74 Harv. L. Rev. 1408, 1412 (1974).

49. Even in these cases there may however be circumstances which make reliance on the market unwise. For example, there may be less than complete prior warning of a work's contents See Gordon, *supra* note 16, at 1627-35 (circumstances that may justify a departure from the market).

50. For arguments that the public has neither a positive nor a normative entitlement to the price and quantity of works that they could have obtained in a world without intellectual property rights, see Gordon, *supra* note 1, at 1446-55 and 1460-65; for arguments that the creators of intellectual products have a normatively acceptable conditional entitlement to be paid for the works they produce, see *id*. at 1455-60 , and Gordon, *supra* note 5, at section ID (presenting a modified corrective justice claim).

there will be some coercion—in the sense of some nonconsensual limitation of someone's choices—is inevitable.[51]

In sum, there are clearly fewer normative and incentive difficulties in having a legal system award payments to persons who make others better off by creating new works of authorship or invention than there would be in having a legal system award payments to persons who merely take actions that avoid harming others. Therefore, the common law's reluctance to use restitution as a means of controlling harm-causing behavior does not cast a cloud over intellectual property.

III. VOLUNTEERS AND FREE RIDERS

A. Restitution's Rules Against Rewarding Volunteers

The rule against granting restitution to persons who refrain from causing harm was a fairly easy rule to justify. Let us take one more step in the direction of difficulty. How should the law treat persons who do not merely refrain from harm, but who confer affirmative benefits on others?[52] For them, awarding restitution would seem not to raise dangers of extortion and eroding norms. Further, it is well recognized that one is ordinarily behaving rightfully when one refuses to labor on another's behalf and that because of this entitlement not to labor, labor can be the premise for a valid contract. Nevertheless, the well-known doctrine prohibiting restitution to "officious intermeddlers" and "volunteers"[53] provides that persons whose labor makes others better off will ordinarily have no legal recourse, if they labor without advance agreement. Yet intellectual product producers can sue to obtain payment for the "fruits of their labor" from copyists who never agreed to pay. Can these results be squared?

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51. If users are not forced to choose between paying and doing without, creators will be forced to choose between not selling at all and enabling their customers to use their work in competition with them. The inevitability of coercion in the intellectual property context is discussed at more length in Gordon, *supra* note 1, at 1425-35, and sources cited therein.

52. As noted above, the usual baseline for determining harm and benefit in common law tort causes us to ask what the complaining party's welfare level would have been had there been no interaction with the other party. This is also the baseline implicitly used in most everyday discourse, and the one used in this paper to define harm and benefit. This commonplace baseline is in turn consistent with the normative baseline I defend elsewhere: that strangers ordinarily have no entitlement to the goods others' efforts produce. See sources cited in note 5 *supra*. If so, then they are not "harmed" if deprived of those goods, and if given some are "benefited", from the perspective of either a positive or normative baseline.

53. Restatement of Restitution, *supra* note 7, § 2; also see *id.* §§ 106, 112. It is sometimes said that when recovery is denied, plaintiffs tend to be called "intermeddlers," but when they win, they are more likely to be called "volunteers." Both words refer, however, to the same basic pattern: conferring benefits on someone who has not asked for them. This article uses the terms interchangeably.

To prevail in restitution, persons whose voluntary actions provide benefits to others must ordinarily show one of a few very narrow justifications for departing from the market: mistake,[54] coercion,[55] request,[56] or a narrow range of exigent situations, such as danger to life and health.[57] Even then, their ability to recover will often be further restricted by the courts' desire to be sure that the defendant really was benefited and that forcing him to pay or disgorge will not leave him worse off than he would have been in the status quo ante.[58] Other limitations tailored to particular situations (such as the requirement that only a person who "intends to charge" may recover payment for services rendered in an emergency)[59] further restrict the voluntary actor's ability to sue for payment in recompense for beneficial labors performed.

The Restatement of Restitution is not hospitable to persons who generate benefits as a by-product of self-serving activity. Thus, the Restatement states that:

> A person who, incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.[60]

For example, a mine owner whose drainage efforts clear both her mine and her neighbor's mine of waters is not entitled to contribution from the neighbor.[61]

A person who writes a book and publishes it is certainly operating in the furtherance of his or her own interests. Except as to someone who has bargained with the author for production of the work (such as a patron, granting agency, employer, or contract-publisher), the author is a sort of volunteer. When a book is mass-marketed, many strangers will come across it. If a stranger makes copies of the book for sale, copyright law will give the author a right of action against the copyist even if the author "volunteered" to send the work into the stream of commerce. Since that right of action will be available whether or not the copyist had a contract with the author promising to refrain from copying, and whether or not the copyist's actions harm the author,[62] it is clear that under copyright law a unilateral transfer of "benefits" is sufficient to trigger liability.

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54. Restatement of Restitution, *supra* note 7, §§ 6-69.

55. *Id*. §§ 70-106.

56. *Id*. §§ 107-111.

57. *Id*. § 112.

58. See for example *id*. § 40, cmt. b, at 109.

59. *Id*. § 114. See Landes & Posner, *supra* note 15.

60. Restatement of Restitution, *supra* note 7, § 106. There *are* situations in which protecting one's own interests does not bar restitution, but these tend to be associated with coercion, as where a property owner discharges another's duty when that is the only way to prevent a third party from lawfully taking the property. *Id*. § 103.

61. *Id.* § 106, illus. 2.

62. Sometimes the absence of harm may make it easier to obtain fair use treatment, however. See Sony Corp. of America v. Universal City Studios, 104 S. Ct. 774 (1984).

How then can copyright or any other form of intellectual property be squared with the rules against giving restitutionary rights to "volunteers"? I will suggest that the reasons for denying recovery in "volunteer" cases do not apply to most conflicts over intellectual property.

One basis for the refusal to reward volunteers is the danger of compulsion and a preference for free choice: one should not be required to pay for what one has not asked for.[63] The classic justification for the "volunteer/intermeddlers" doctrine is that without it, a recipient of benefits, who is best capable of handling his or her own affairs, would be forced to cede control to the intermeddling of outsiders, whether well-meaning or self-serving.[64] Another related concern is that if any compulsion is imposed, it be imposed fairly.

Also, there is a concern with avoiding harm to the defendants—a concern that restitution might require the recipients of benefits to pay more than the benefits are worth to them.[65] If the recipients have not bargained in advance, it is hard for a court to know how to value the benefits conferred and hard to be sure that subjecting the recipients to restitution would not leave them worse off in the end than if they had received nothing. No one can afford to pay market price for all the desirable goods in the world.

Another set of concerns involve deleterious systemic effects. Restitution may undermine the operation of efficient markets, for example.[66] Consumers should actively seek out the lowest prices for products that best meet their needs and not be forced to pay for whatever a volunteer foists upon them.[67] Further, willing buyers and sellers can set up a pricing mechanism more effectively than can a court operating at second remove. If the availability of restitution substitutes courts for markets, there could be a sharp increase in administrative costs and an increased risk of inefficient resource allocation. Such systemic costs could be considerable.[68]

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63. See John Wade, Restitution for Benefits Conferred Without Request, 19 Vand. L. Rev. 1183 (1966); Edward W. Hope, Officiousness (Parts I and II), 15 Cornell L.Q. 25, 205 (1923-24).

64. It has been argued, for example, that if courts allow recovery for benefits conferred without request, "the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another to his cost and to his ruin." Isle Royal Mining Co. v. Hertin, 37 Mich. 332, 338 (1877) (as quoted in Wade, *supra* note 63).

65. We have seen this concern operating before. See text *supra* at notes 26- 27.

66. Levmore, *supra* note 8.

67. This justification in turn has several dimensions: If consumers know what is best for themselves and are likely to reveal their preferences honestly only in actual bargaining, then court-imposed bargains will try to be a poor substitute for real markets. See, for example, Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules and Inalienability Rules: One View of the Cathedral, 85 Harv. L. Rev 1089 (1972). Consumers left to themselves will find efficient providers, because such providers will provide more product for less money; a restitution system would undermine efficiency by giving payment to inefficient providers who happen to be fast enough to provide the desired thing before the consumer has concluded his or her bargain with the intended supplier. See Levmore, *supra* note 10.

68. The goal of reducing systemic costs, like the other goals discussed here, is not an absolute. For example, the cases reflect no single-minded devotion to finding the lowest cost alternative, but simply a preference for avoiding high costs and for giving desirable incentives where possible within the constraints imposed by other goals.

In the following section, this article suggests that in the typical intellectual property context, where one person deliberately sets out to use a work authored by another, awarding restitution would be consistent with the goals of preserving autonomy, avoiding harm, and minimizing systemic costs. It also suggests that it is a desire to achieve these goals—and not an indifference to rewarding and internalizing benefits—that explains the overall "volunteer" rule.

B. The Structure of Plaintiff/Defendant Relations in Torts and Restitution

Comparing the structure of the relationship between plaintiff and defendant in "volunteer" cases and in intellectual property cases will allow us to lay to rest a large part of the "asymmetry" challenge. In our initial discussion of the purported asymmetry in the common law's treatment of harms and benefits,[69] cases where suits for harms were allowed were implicitly compared with cases where suits for benefits would be disallowed. If we compare the underlying fact patterns handled respectively by tort law and by the restitution doctrines regarding volunteers, however, we see they are distinguished not only by the difference between harm and benefit, but also by the far different roles played by the defendant in the two classes of cases. I will argue that the difference between the underlying structure of tort suits and the structure of the paradigmatic "volunteer" cases provides a more plausible explanation for any difference in result between torts and "volunteer" cases than the mere difference between harm and benefit.

In all the classic examples in which the law would refuse restitution, the benefactor conferred benefits on the other party without that party's having sought them. When Harriet's hotel complex causes a rise in land prices, or when the drainage effort of a mine owner clears both her mine and her neighbor's mine of waters,[70] or when *M* recommends *H*'s services so that *H'*s profits rise, [71] none of the recipients has asked for their benefits or has even had the opportunity to refuse them. In each case a "volunteer" as plaintiff is paired with an "involuntary recipient" as defendant. Let us call these "paradigmatic pairs," since this pairing presents the paradigmatic structure for which the "volunteer/intermeddler" doctrine was initially crafted. It should be contrasted with the pairing of injurer and victim in the ordinary tort case.

In the ordinary tort case, the person sued *did* something to bring the suit upon him or herself. D has imposed a cost on P without P's consent, so there is some fairness in using the legal system to make D respond in kind.

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69. See text at notes 9-12 *supra*.

70. Restatement of Restitution, *supra* note 7, § 106, illus. 2. Also see Levmore, *supra* note 8, at 72 (no restitution when *W* cleans up his own groundwater and causes an increase in the purity of his neighbors' wells).

71. Levmore, *supra* note 10.

In restitution cases involving the "paradigmatic pair," P helps D, and then P sues D. The only active person is P. Involuntary recipient D has *done* nothing: D has neither made P generate benefits nor actively worked to direct those benefits toward himself.[72] The "volunteer" P cannot credibly claim to be redressing any burdens involuntarily thrust upon her by D. The only thing that P is suffering involuntarily is D's non-payment. While one can see why the injurer in a tort case might be considered responsible for the plaintiff's injury, it is harder to see why the involuntary recipient should be responsible for the plaintiff's failure to negotiate a fee in advance.[73]

Where a plaintiff's claim is not based on an action by the defendant, the plaintiff's suit has a lesser claim to fairness. At least a century of jurisprudence has seen in our system's insistence on an "act" as a prerequisite of liability, a means of reconciling fairly the citizenry's simultaneous claims for security and liberty.[74] The law's refusal to impose liability on the passive member of a paradigmatic pair is consistent with this traditional balance. The "no recovery" rule in such cases would seem to be attributable more to the passivity of the defendant than to a distinction between harm and benefit. Thus the "volunteer" cases do not suggest that courts should deny restitution in cases containing active defendants.

Restitution's paradigmatic pairs do not appear in the typical intellectual property case.[75] Although one might well view intellectual property plaintiffs as "volunteers," intellectual property defendants who seek out a creative work and deliberately copy it for their own gain are hardly "involuntary recipients." As in ordinary tort suits, the fact patterns that ordinarily give rise to intellectual property suits have *active* defendants. Within restitution itself the presence of a

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72. I do not mean to overstate the active/passive distinction. The line between the two categories is elusive. For example, by taking advantage of what the volunteer has done without rendering repayment, the recipient may be "acting" in a way that decreases the importance of his or her initial lack of choice.

73. This latter argument owes its origins to a comment in Charles Fried, the Artificial Reason for the Law Or: What Lawyers Know, 60 Tex. L. Rev. 35, at 46 (1981). The strength of such fairness based arguments depends in part on there being market avenues through which the plaintiff *can* seek a fee or otherwise capture the benefits it generates. Where plaintiffs cannot reap the relevant payments through consensual agreement, then neither party is more fairly responsible than the other for the failure of payment, and the same reasons which impel the law to "make bargains" in torts and other areas can potentially justify liability here. As discussed below, without property rights the fee-collecting efforts of intellectual product creators will often be blocked by transaction costs and strategic behaviors among users. Similarly, in some restitution cases emergencies make resort to the market impossible. In such contexts Fried's argument against restitutionary recovery would be inapplicable.

74. See for example Oliver W. Holmes, The Common Law 115 (M. D. Howe ed., 1963) (originally published in 1881), and Richard Epstein, *supra* note 12. Although Holmes and Epstein are an odd set of bookends (with Holmes insisting that the mere fact that an act causes harm should not alone be a sufficient basis for liability and Epstein's one-time insistence on the opposite), they are not unusual in agreeing that the law should not impose liability where an act is lacking.

Of course, there have been many contrary strains as well in that same jurisprudential century. Some instrumentalist approaches, for example, might impose liability precisely to encourage action where it was formerly absent.

75. Where such pairs do appear, plaintiffs should lose even in the intellectual property context.

choice by the defendant tends to assist plaintiffs in recovery.[76] Therefore the "volunteer" pattern does not condemn intellectual property recoveries.

An example will illustrate the importance of this active/passive issue. Levmore, in arguing that the law treats harms and benefits asymmetrically, presented as one of his examples the following:

> [I]f M often recommends H's services so that H enjoys increased profits, H owes no restitution—whether or not M is paid by those seeking advice. Yet if M defames H's business, H can collect for lost income.[77]

But praise is not the true "benefits" analogue to defamation. For in defamation the defendant M has been active, while as a recipient of praise defendant H has been passive. The better analogue to defamation is a case where the defendant actively advertises another's endorsement in order to increase his own profits. This case turns the "harm" element into "benefit" but retains all the other elements of the defamation action, including the active status of the defendant. In endorsement cases, a suit to recoup the benefits received is far from disfavored by the courts. In virtually all states today the putative endorser, whether a private person or a celebrity, can sue for use of his name in such a connection under the rights of privacy or publicity—asserting a right to restitution, if you will, good against those who actively seek a particular kind of benefit.

C. Beyond the Involuntary Recipient

Suits for restitution by "intermeddlers" have three implicit but separable components: First, the plaintiff claims that she has given the defendant something of hers that warrants payment. With intellectual products that is typically labor, combined with the money and other resources of the plaintiff that went into the making of the intellectual product. Second, the plaintiff asserts that her claim to payment should not be defeated by the fact that she no longer has her usual leverage by which to obtain payment by contract. Third, the plaintiff asserts that this claim to payment should not be defeated by the involuntary nature of the setting in which the benefit was transferred to the defendant.

Let us dispose of the involuntariness issue by assuming that intellectual property suits should be limited to those occasions where the recipient voluntarily seeks the transfer of benefits to himself.[78] We would then have to face

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76. See for example Birks, *supra* note 27, at 114-16, 263; Wade, *supra* note 61, at 1212 (restitution favored if the benefactor "affords the other an opportunity to decline the benefit or else has a reasonable excuse for failing to do so.")

77. Levmore, *supra* note 10.

78. Of course, even a person who actively seeks out benefits may not voluntarily *pay* for them, but that is a separate issue. All property involves involuntariness about payment: if you take my briefcase, the law makes you pay for it even though you may not want to. While that is coercion of a sort, see Robert Hale,

the merits of the remaining components of the claim. The plaintiff was once in control of the labor and other assets, and the law would have prevented strangers from forcefully extracting them from her—but she allowed them to escape her control by investing them in the creation of a product which she sold. Now someone threatens to reap more from her efforts than the plaintiff bargained for: the purchaser of her book, boat hull, or invention may have wanted only to use the object she sold him, but now some someone wants to copy it and sell the reproductions. Should resources voluntarily invested warrant explicit extracontractual judicial protection against deliberate use by others?

If deliberate uses of others' efforts always triggered an obligation of payment, it would cause paralysis. What defines a community is interdependence: persons learn from each other, sell products complementary to each other's products, build on a common heritage.[79] A general principle requiring payment for all benefits reaped would destroy the synergy upon which culture and commerce both rest. But sometimes need and practicality may conjoin to make some such protection desirable; after all, one purpose of tangible property law itself is to offer extracontractual legal protection for voluntary investment, as when the law forbids marauders from raiding a stranger's storehouse.

Some criteria immediately suggest themselves as candidates for marking off those areas of enrichment that are suitable for judicially ordered payment.[80] First, as the prior discussion suggests, intentionality on the recipient's part is one factor relevant to the appropriateness of granting a right over benefits. Whether or not the benefits are substantial (rather than *de minimis*) and whether they are traceable to their origins are two others. In addition, it is likely that a lawmaker will feel it unnecessary to order restitution for a benefit that is of a reciprocal sort[81] unless necessary for incentives.[82]

But even substantial and non-reciprocal benefits can be deliberately utilized without a duty of payment being imposed. For example, hundreds of motels and restaurants may be built (quite intentionally) to take advantage of a tourist attraction like Disneyworld, without the Disney organization having any right of recompense. The following sections examine additional criteria that may account for this pattern, and their implications for intellectual property.

Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 612 (1943), it is still premised on some sort of voluntary action on your part (taking the briefcase) in effectuating the basic transfer. If one were to reformulate the analysis to incorporate the involuntariness about payment, then one would say that defendants in paradigmatic volunteer cases have two claims of involuntariness: (a) they were involuntarily forced to receive benefits, and (b) now the plaintiff is seeking to force them involuntarily to pay for what they received.

The focus here is claim (a). The focus of section F, *infra*, will be on claim (b).

79. See for example Dawson, *supra* note 48.

80. For a full discussion of relevant criteria and their application, see Gordon, *supra* note 5, at sections III-IV.

81. Reciprocity minimizes the likelihood there will be unfairness between parties.

82. See generally Thomas Schelling, Micromotives and Macrobehavior (1987) (tragic common, prisoner dilemma, and other examples show that even the presence of reciprocal payoffs does not guarantee mutually beneficial cooperative behavior).

D. Harm and Autonomy: Demarcation

As noted earlier, courts often deny restitutionary recovery where defendants are passive, in part to protect the defendants from being harmed and having their autonomy impaired. But limiting any restitutionary right to intentional uses will provide less than complete protection for defendants.

If things are not bounded and marked, the strong possibility exists that people will knowingly use them—and thus trigger an obligation of payment—but do so without knowing they are using something that has a price tag. As a result, they may be worse off after receiving the "benefit" and having to pay for it than they would have been had they never received it at all. Thus, in addition to intentionality, there must be demarcation; things that trigger obligations of payment must be identifiable in advance, and marked as such. The legislature must define the covered subject matters (books? inventions? ideas?) and producers must provide a way to indicate *which* of the potentially covered subject matters (*this* book?) are owned and by whom.

If owned things are defined, and marked as owned, then people will not use those things unless they believe that the use is worth the charge they will later have to bear (discounted by the possibility of enforcement). Notice and warning reduce the danger that recipients will pay more for a thing than the value they place on it. Though some surprise is inevitable (a book does not fully disclose its contents by its title and reviews), users are less likely to be taken by surprise by bounded and explicit claims; what they use, they will expect to pay for. Notice can also minimize the administrative costs of tracing ownership.

For this and other reasons, demarcation plays a strong role in intellectual property.[83] Patents must be clearly defined and placed on record; owners of patents, copyrights and trademarks are encouraged to mark their works with notices (the famous "C in a circle" is only one of many such notices);[84] and there are governmental facilities to register one's copyright, trademark, or patent claim. Further, traditional intellectual property doctrines largely limit their protection to fairly clearly bounded and demarked subject matters—such as works "fixed in a tangible medium of expression" for copyright.[85] Even those states that permit recovery for unauthorized use of "ideas" generally require that these ideas be "concrete" and narrow. Similarly, when the New York Court of Appeals was asked to decide whether an extemporaneous conversation of a famous author could be owned, the court stressed the importance of "distinct, identifiable boundaries."[86]

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83. It has also long been recognized, for example, that clear demarcation contributes to the efficient working of markets. See, for example, Clifford Holderness, A Legal Foundation for Exchange, 14 J. Legal Stud. 321 (1985); Gordon, *supra* note 18, at 1612.

84. The copyright notice is no longer mandatory, though advantages still adhere to its use.

85. In fact, controversy over standards of infringement in intellectual property law frequently centers on the danger that their application will blur otherwise-distinct subject matter boundaries.

86. The court noted that even if conversation were capable of ownership (a question the opinion did not

So long as demarcation is practicable and practiced, intellectual property can avoid some of the most obvious dangers to autonomy: users will know in advance if they are using something that imposes an obligation of payment and can decide whether the benefit to them is likely to exceed the price.

E. Systemic Costs and Benefits

One reason for refusing to order restitution for an intentional reaping of benefits is that a potential benefactor may be able to obtain payment without recourse to the courts. In the typical volunteer case, it is the volunteer (the future plaintiff) who knows what he is about to do and is in the best position to make a bargain about it. Harriet knows that her hotel will raise land values where it locates, the mine owner knows that her efforts in pumping and draining will help her neighbors, and M knows that his recommendations will help H's business. And even if they do not know, persons like them are in a better position to know than are unknowing recipients.[87] There is usually no good purpose served in letting such persons go to court, and a considerable risk in doing so.

If the volunteer thinks the law will not give restitution, then she will seek to make a bargain by asking the potential recipients for contributions before the project begins. Something like this happens in oil exploration: neighboring lessees will learn a great deal about whether or not it is worthwhile to drill under their own land from the results of their neighbor's drilling. So "dry hole contribution agreements" have come into being: contracts by which the neighbor who stands to benefit from the information agrees to pay a share of his neighbor's drilling costs should the hole come up dry. In many shopping malls, where small stores are likely to benefit from the propinquity of large department stores that draw masses of customers, the small stores may be willing to pay extra rent to subsidize the larger stores' entry. Similarly, if landowners like Peter are likely to benefit from a venture like Harriet's, she might try to persuade them to pay her something to encourage her to build nearby. Or, as another alternative, the owner of an attraction could simply buy the land on which the beneficial spillovers will fall. This is apparently what the Disney organization did with

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reach), in order to recover a speaker would have to "indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wanted to exercise control over its publication." Estate of Hemingway v. Random House, 23 N.Y. 2d 241, 244, N.E.2d 250 (1968) (dicta). The case illustrates the importance of demarcation to the fair treatment of defendants. A. E. Hotchner wrote a biography of his friend Ernest Hemingway, which quoted extensively from their conversations. When Hotchner used the conversations, he had no idea ownership would be claimed in Hemingway's oral speech, but later Hemingway's widow brought a suit against Hotchner claiming such ownership. Had she prevailed, the biographer would no doubt have been taken by surprise—despite the fact that his use was intentional. He might have been forced to sacrifice the book or, in order to save it, to pay the widow much more than the verbatim record of the conversations had been worth to him ab ante. In the end, the New York Court of Appeals dismissed the widow's suit.

87. The law often makes judgments based not only on the likely distribution of information, but also of information costs.

Epcot: it bought up surrounding land and built on it enough hotels and restaurants to capture much of the benefit Epcot generates.

If a benefit-generating landowner has realistic opportunities that she lets slip through her fingers, there is no reason for the judiciary to come to her aid. As a mode of internalization, market bargains are clearly preferable to restitution suits, with their attendant problems of uncertain valuation, forced purchase, and the like.[88] Therefore, at a minimum, there needs to be some good reason for the plaintiff's failure to have sought advance consent from the benefit's recipient.

In restitution law the range of acceptable reasons is quite limited, as mentioned above: mistake, request, coercion, and a narrow range of emergencies. One can understand the narrowness; given the continual use by everyone of benefits generated by others, sharp boundaries are needed to keep us off the slippery slope that could lead to a paralyzing morass of claims. [89]

How does this relate to intellectual property?

Objections to restitution based on high systemic costs lose much of their force where the presence of a restitutionary right will allow markets to evolve, rather than substitute for a market transaction.[90] In the classic volunteer setting, giving volunteers a restitutionary right may discourage them from seeking the consent of potential recipients,[91] but in the intellectual property setting giving creators restitutionary rights tends to encourage consensual markets.[92]

This occurs largely because the identity of the party who has superior access to information and who is otherwise better able to enter transactions is different in the two contexts; the law needs to speak to the party able to react to its messages.[93] In the "volunteer" context, the benefactor (plaintiff) has the greater

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88. There may also be nonmarket alternatives that have advantages over individualized restitution suits. For example, if coordination problems among Peter and his fellow landowners prevent them from reaching agreement with Harriet, she as a potential generator of beneficial spillovers might also seek subsidies or tax breaks from the local government. Conceivably such an entity might have institutional information-gathering advantages over a court.

89. Thus proposals to award restitution whenever transaction costs bar otherwise- desirable trades considerably overshoot the mark. For such a proposal see Note, A Theory of Hypothetical Contract, 94 Yale L.J. 415 (1984).

90. Intentional torts like trespass have both characteristics: they encourage consensual bargains but, when someone disregards an owner's right to withhold consent, they give the owner at least a market-like payment via the tort damage remedy. Punitive damages and criminal law "kickers" further encourage use of the consensual route. Calabresi & Melamed, *supra* note 67.

91. Even within the volunteer area, there can be occasions when giving restitutionary rights will not inhibit market formation; on those occasions, the law is more likely to give restitution. See Levmore, *supra* note 10.

92. Intellectual property law also imposes liability for harms, of course, which can operate to preserve markets; but markets capable of being harmed may not come into being unless the law gives some right over benefits. (As elsewhere in the article, I am defining harm and benefits in relation to a status quo baseline.) Therefore the restitutionary species of right is the more fundamental.

93. If information is distributed in such a way that only a potential plaintiff can react to a rule of law by contracting around it, then, other things being equal, a no-liability rule is preferable. This is the volunteer case. If information is distributed in a way that only a potential defendant can bargain around the applicable legal rule, then, other things being equal, a rule imposing liability is preferable. This is the intellectual property case.

access to information, and the rule of law that encourages desirable market-forming behavior in the volunteer benefactor is a rule of no liability.[94] In the intellectual property situation, by contrast, a no-liability rule creates the possibility of market-impeding strategic behaviors. Because here it is the recipient/copyist (defendant) who has the greater access to information and who can better initiate a transaction, [95] the rule that would encourage the formation of markets here would be a rule that imposes liability. The rule of law in each case gives the party with information and ability to internalize the incentive to do so.

To illustrate why a rule of no liability would have little effect in encouraging creators to make bargains with potential users, note that it is the copyist (the future defendant) who knows what he is about to do and is in the best position to make a bargain about it. For example, only the copyist knows how many copies he intends to make of what work. The creator may not even know that the copyist exists. As a result, a creator who wanted to respond to a rule of no liability by making bargains with potential recipients might be unable to do so. Since a copyist, who is in the best position to initiate bargaining, will seek to make a bargain only if he thinks that his unconsented use will result in liability, a rule imposing liability upon the copyist is likely to best internalize benefits to the author.

Enforcement practicalities aside, such liability defeats much strategic behavior and brings needed information forward: a potential copyist who knows he risks hefty liability for copying without permission may be willing to disclose his identity and seek a license.[96] Because of this, a rule imposing liability helps cure market failure in the intellectual product context.[97]

In the volunteer cases, internalization is effectuated by consensual arrangements, against a background of liberty-to-use potentially distressing to the provider of benefits. In the intellectual property cases, internalization also occurs via the market, but against a background of judicial compulsion potentially distressing to the copyist.

94. If restitution suits were available to volunteers, they could choose whether to proceed via suit or via consensual bargain. Volunteers who have poor quality goods or unreliable skills are precisely those who might fear that recipients will refuse what they have to offer, and who might prefer to sue rather than worry about the recipient saying "no." Volunteers who expect recipients to be willing to pay are likely to prefer face-to-face negotiations.

But direct negotiations are not always practicable, even for the possessors of skills and objects that others desire. Conceivably, rather than refusing to give restitution, the law could condition recovery on proof of a not monetizable benefit to the recipient, coupled with proof either of the volunteer's having made a good faith effort to proceed via the market, or proof that market failure precluded even such effort. Compare Note, *supra* note 89.

95. Also see Holderness, *supra* note 81 (analyzing the transferability of "open" versus "closed" entitlements).

96. There is the possibility that even with liability, a copyist will copy without permission in the hope that he or she will not be apprehended. This introduces familiar questions about remedy and deterrence.

97. For a fuller outline of the way intellectual property rights encourage markets, see Gordon, *supra* note 16, at 1610-14 (markets in copyright); for other economic functions served by copyright doctrines, see Landes & Posner, *supra* note 3.

Of course, occasional cases of market failure should not immediately trigger judicial exceptions. The cost of making individualized inquiries is high. For example, in the ordinary property case, it may be appropriate for courts to refuse to investigate whether market arrangements are impracticable because a closed-door policy may usefully encourage internalization by contract to occur fairly frequently.[98] Where consensual bargains *cannot* be reached in a definable and significantly large class of cases—arguably, most intellectual property contexts—then the law's refusal to intervene is less justified. A legislative or judicial body may be acting properly when it declares that class of situations entitled to different treatment (provided, of course, that the costs of maintaining the system do not eat up the resulting gains).[99]

From the incentive perspective, a benefactor need not be paid so long as that person, and persons like him, would engage in the benefit-generating activity regardless of the possibility of obtaining restitution from beneficiaries. In many restitution cases, the plaintiffs had their own sufficient motives for engaging in the activities independent of the potential payment from the recipient.[100] A court may presume that because the person seeking payment has already engaged in the valuable activity, incentives are irrelevant. Of course, incentives should remain relevant if the benefactor is engaged in an act that others are likely to replicate; there may exist a substantial class of persons *like* the plaintiff, who have not yet engaged in the valuable activity but would do so if restitution were assured. But the court may have no way to know of their existence. The varying fact patterns of different "volunteer" cases may make it difficult for a court to generalize to classes of activities or to make predictions about categories of behavior. In such cases, ex post reasoning may be a court's only recourse. It is also possible that other restitution cases may underplay the need to provide incentives because they arise out of situations like those involving mistake, where the parties because they fail to understand their situation are not aware that restitution is directly implicated and is likely to affect their payoffs. Judicial

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98. An important part of the classic public goods problem is strategic behavior by consumers: under-disclosure of their desire for a good they can obtain without paying for it. In the paradigmatic volunteer cases, the danger of strategic behavior is low. The recipients are readily identifiable in advance and are usually limited in number, so bargaining is likely to be fairly easy. The very fact that a volunteer chooses litigation over advance bargaining is therefore suspicious, suggesting that the recipient would have thought the benefit not worth the price tag.

There is a possibility, however, that a recipient will refuse to pay even if he values the benefit at more than the price demanded, attempting to obtain a "free ride" by gambling on the volunteer's willingness to continue without his contribution. In the land context, where the development is in the public interest, the government may be able to solve the problem by using eminent domain. Where eminent domain is not appropriate, desirable development may not occur. See Lloyd Cohen, Holdouts and Free Riders, 20 J. Legal Stud. 351, 359 (1991); also see *id.* at 362 (special legal rights solving an analogous problem in the corporate context).

99. As was suggested earlier, the availability of self-regulating market avenues in most intellectual property contexts should keep the transaction costs fairly low.

100. For example, the mine owner who drains her mine and also happens to drain her neighbor's.

efforts to create ab ante incentives can have only muted effects when addressed to parties whose primary attention is elsewhere.

With intellectual products, by contrast, the actors know their fortunes will be affected by the shape of intellectual property law. Further, the existence of potential incentive effects is obvious.[101]

In a world without intellectual property rights, an author may want to bargain with her audience for payment, but the audience is likely to be a wide and uncertain one. The potential recipients are a far-flung audience, and the benefits are those that will flow from an as yet undisclosed intellectual product.[102] Even if the author could somehow identify all the potential recipients, it would be expensive and awkward to reach simultaneously all of the persons who will eventually want access to the work. Even if this were possible, what would happen when the creator tried to negotiate for a payment from them all in exchange for disclosing the work? Many of those audience members might be tempted to hold back in the hope that others' monies would be sufficient to draw the work into the marketplace where they could then make a cheap copy. The larger the group of potential purchasers, the better the odds on the gamble may seem. Also, the work's contents are largely unknown at this stage; the less certain the benefits, the less seems to be risked if the gamble does not pay off. Good odds in favor of winning, and low perceived cost in the event of a loss, make the gamble very tempting.[103] If enough people take this gamble in the hope of taking a free ride, the requisite funds may not be forthcoming.[104] "Chicken," "prisoner's dilemma," and other free rider games[105] illustrate analogous dynamics.

Free riding is not unique to intellectual property cases. The same temptation also plagues land development efforts, and is one of the reasons why governments are given the power of eminent domain[106]. The problem is endemic

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101. It has also been argued that intellectual products will be adequately produced without explicit legal intervention; see note 105 *infra* and accompanying text.

102. Compare Holderness, *supra* note 83.

103. Also, if the work is as yet undisclosed, there is an element of risk even in paying the creator: the work when received may turn out not to have been worth what was paid. For all these reasons, an audience member may decide that the net payoff of the "free ride" gamble is higher then that of the "purchase" gamble.

104. The danger, of course, is the classic public goods problem: that the resulting pattern of low funding will discourage desirable endeavors. An intellectual product is, in Paul Goldstein's phrase, a "privately produced public good."

It might be argued that if members of the audience are unable to coordinate themselves to overcome this problem simultaneously and voluntarily, then the group members could, in stages, sign a contract to impose duties of contribution on themselves that would be effective only upon the assent of all or a designated percentage of them. Indeed, if audience members could reliably impose such duties upon themselves, court-imposed rules would be unnecessary. However, most of the same information gaps, transaction costs, and free rider problems would plague a group of audience members in their efforts to obtain consent to such a contract as would afflict an author or publisher.

105. See Charles Goetz, Law and Economics 12-37 (1984); Morton D. Davis, Game Theory 95-103, 128-31 (1970).

106. A related reason is the possibility of hold-outs. Persons owning land on which the developer wants to build may not be able to free ride by holding on to their property; they might in fact suffer if the development

and worse with intellectual property.[107] Just as eminent domain can solve the strategic behavior problems in land development, copyright can solve these strategic behavior problems among authors and users.

The presence of a publisher does not much alter the desirability of granting intellectual property rights to resolve potential bargaining stalemates. Admittedly, the author may find it easier to deal with a publisher than with an undifferentiated audience (only one party; low transaction costs), but then the publisher must deal with the audience. The author's problems with information, transaction costs, and free riders would simply be passed on, one step further down the line. How much would a publisher pay for a book that could be lawfully copied by all comers once it appeared on the market? Unless the publisher has a lead-time advantage or some other sort of real-world clout[108] that can discourage copying, the rate the publisher would offer the author in such a world might be too low. If the anticipated rate of payment is low, otherwise-desirable works may not be created.

In sum, because of the structure of the volunteer/recipient relation, the rule that best speaks to most volunteers is a rule of no liability. Because of the structure of the creator/copyist relation, the rule of law that best speaks to the copyist is a rule of liability. Thus, the same market-furthering considerations that suggest there should be no liability in the volunteer context suggest that there should be liability in the intellectual property context. Further, in most of the fact patterns that give rise to volunteer cases, courts are likely to believe ab ante incentives either unnecessary or difficult to provide effectually through judicial intervention.[109] By contrast, the need for a liability system to provide positive

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were built around them. They might nevertheless engage in strategic behavior—"holding out"—in order to extract a significant portion of the developer's gain. See Cohen, *supra* note 98.

Note that eminent domain is allowed only where there is a "public purpose". Judicial intervention to cure private parties' frustration regarding free riders and hold-outs in the land context could be costly; to allow recourse to judge-set prices every time a land buyer could make a plausible argument that strategic behavior was blocking an otherwise-desirable bargain could drastically undermine the self-regulating market system. For intellectual property, however, when it is advisable to end the indeterminacy in which bargaining might be floundering, the mode of intervention does not undermine market functioning. Quite the contrary. So not only is the need for intervention like to arise more often with intangibles than with tangibles, but it also has lesser systemic cost.

107. Denying restitution may work to encourage internalization through voluntary bargain in many land cases, and for real property this market encouragement may be more valuable than the social loss stemming from the occasional bargain that founders. But for intellectual property, denying a right of action is not likely to have the same market-encouraging effect.

108. For example, publishers might threaten to issue retaliatory below-cost editions if pirate editions appear. Other non-copyright modes of restraining copying include gentlemen's agreements, book clubs, patron relationships, and technological fences. The classic source here is Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Book, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970) ; also see Gordon, *supra* note 1, at 1334-54, 1400-05 (discussion of "copy-privilege"), and the sources cited therein.

109. Emergencies constitute an unusual class of "volunteer" cases, for here incentives are predictably important and the actors know they will be affected by restitution law. This reinforces the discussion in the text, for emergencies will often give rise to volunteer recoveries. See Restatement of Restitution §§ 112-117.

incentives is likely to be greater in regard to intellectual products than it is for other kinds of resources, and the commercial producers and users of intellectual products are likely to be quite responsive to legal stimuli. A strong argument in favor of intellectual property rights is made when the greater need for positive incentives is coupled with a fairly low cost market mechanism for their provision.[110]

F. Fair Compulsion

Fairness and compulsion are the last of the considerations identified earlier as contributing to restitution's reluctance to order payment for benefits generated. At first blush, a person who intentionally uses a demarked, bounded product would seem to have little ground to complain if payment is demanded for his use. The purchasing decision remains his own. But such a person may still complain that he is being subjected to an unfair compulsion, because he is being forced to choose between paying for what he wants and not having it. Using legal compulsion on persons who act intentionally and after warning is not ipso facto justifiable. The bully who says, "Cross that line and I'll knock your block off" is not and should not be privileged to batter the person who intentionally and defiantly crosses the line. He may be a more honorable bully than the one who hits the other children without warning, but he remains a bully.[111] So even an active recipient can accurately claim he is being "compelled" when he is made to pay for a demarked resource he has used.

This is not fatal, however. The primary question is not whether compulsion is used, but whether it is being used fairly. If the user is really using something that is a pure benefit as to him—a mere increase in the number of choices open to him- and he has no prior entitlement to the new thing, then the creator and the law would seem justified in demanding that the user pay for this increase in his range of choices.[112] This is the basic point of John Locke's theory of property: he

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110. I have elsewhere identified this combination as "asymmetric market failure", arguing that the case for intellectual property protection is strongest where (1) in the absence of a legal right potential creators of new works will find it difficult to consummate market bargains, and (2) potential users of those works who could practicably bargain for licenses will be able to do so if the law requires. Where this combination is present, it means that without a duty to pay there will be positive externalities—and that imposing such a duty internalizes without throwing the entire matter into the judicial lap. See the discussion of asymmetric market failure in Gordon, supra note 5, at section III; also see Gordon, supra note 16, at 1610-18 (when market failure makes it unlikely that a potential user of a copyrighted work could obtain a socially desirable license to employ the work, that favors the user being relieved of liability under the fair use doctrine).

111. Before treating a consent as valid, our law consistently asks whether the person posing the choice was entitled to do so. "Your money or your life" is an assault because the highwayman is not so entitled. The same inquiry needs to be made treating as a binding consent someone's willful encountering of a known cost. See *supra* note 1, at 1425-35 ("consent as a criterion for moral adequacy").

112. This assumes that the amount of payment demanded will not exceed the benefit the product brings. To the extent the product can be sufficiently demarked and its contents known, so as to avoid surprise, this is not likely to be a problem: only a person who wishes to use the product at the price marked will do so.

who makes something new without in the process depriving others is entitled to have some right in it.[113] The fairness of the compulsion used rests ultimately on noneconomic grounds. Depending on the nature of the product and the way the public wishes to use it, it may be fair to shift to the noncreator the burden of explaining why he should have an entitlement to something that primarily owes its existence to another's effort.[114]

To satisfy this claim to fairness and to avoid causing harm, the right to restitution would have to be limited to recouping the value added by the benefactor. That can be a difficult scheme to implement.[115] Property is a simpler scheme. But property can bring with it injunctive powers that can extract *more* than the value added, and thus would be inconsistent with a restitutionary cause of action based on a claim to be paid for labor conferred. In this way, intellectual property statutes—which do give injunctive powers—appear to exceed what the logic of a benefits-oriented jurisprudence itself would grant.

Further, the basic principle of restitution gives a right only against that unjust enrichment which is "at the expense of" the plaintiff,[116] much as tort damages are usually limited to those which are foreseeable. In cases where a right to payment is based on labor expended, such requirements of nexus would seem to require that the plaintiff has expended some labor directed toward persons such as *this* defendant. Yet statutory copyright allows suits not only against persons selling in an author's expected and yet unrealized markets, but also against persons who would have been fully outside the plaintiff's range of expectation when she originally produced the work. In this way, too, statutory intellectual property may exceed common law bounds.[117] Conversely, restitution law does not address the special subject matters with which intellectual property deals; in some of those subject matters (e.g., general ideas) the public should have an entitlement capable of trumping any restitutionary claim.

In sum, though a right over benefits to create positive incentives appears to be consistent with traditional patterns of judge-made law, specific forms of intellectual property depart from those patterns. Whether the departures are justified or not is fruit for another article.[118]

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113. John Locke, Two Treatises of Government, Second Treatise at chapter 5 (Peter Laslett ed., Cambridge, 1953).

114. There are indeed grounds for public entitlement, such as free speech or extreme need, but they fall far short of yielding strangers all the benefits others generate. See Gordon, *supra* note 1 at 1459-65. Also see Wendy J. Gordon, Reality as Artifact: From *Feist* to Fair Use, 55 J. of Law & Contemp. Probs. __ (1992, forthcoming) (arguing that the public deserves special latitude to use others' created works as facts.)

115. See Robert Nozick, Anarchy, State and Utopia 175 (1975).

116. Restatement of Restitution, *supra* note 9, § 1 ("a person who has been unjustly enriched at the expense of another is required to make restitution to the other").

117. I argue that common-law notions of connective justice require such connection between plaintiff and defendant. See Gordon, *supra* note 5., at 180-96. 204-5, and 238-48.

118. For a start to that inquiry, see Gordon, *supra* note 1, at 1384-88 (examining the right to sue for unexpected uses of one's work).

F. Restitution and "Natural Law": Implications for Noneconomic Policy Debates

Restitution has a conditional and limited willingness to order payment for services rendered. This article has concentrated primarily on the economic considerations that could explain the exceptional areas in which such restitutionary recoveries are made. Another possibility may be a moral judgment that persons who labor to give others benefits *deserve* some kind of reward for the value their labor helps create.[119] It will be useful to explore briefly the implications that the preceding discussion has for this topic.

In the typical "natural law" defense of intellectual property, the argument may begin with a right to reward for the benefits one's labor has created, but it moves almost immediately to a right of property, putting aside altogether arguments regarding incentives and public welfare. Though the pattern of restitution law surveyed above may be consistent with recognition of a prima facie right to reward based on moral considerations, the ultimate right of recovery seems to generate no more than payment for an author's contribution, however that may be defined; this is less than a full property right. Further, even if one grants a moral starting point for the pattern, its results would seem to depend on a peculiar four-step interplay among policies and principles: (1) First, there might be a moral argument in favor of having beneficiaries pay those who produce benefits. (2) Against this is weighed the desire to protect the defendant, and the fear of eroding the market system and overloading the courts. (3) When exigency is great enough, the need to encourage desirable behavior[120] reinforces the (arguable) original impulse to reward the deserving. (4) If exigent need is joined with some assurance that markets will not be eroded by granting a right of payment, and some protection for the defendant appears, the "incentive" and "reward" policies then conjoin to outweigh any remaining concerns with imposing burdens on the judiciary and protecting the defendant from nonconsensual obligations.[121]

The article has suggested that the active role of the intellectual property defendant may provide him some protection for his autonomy. It has also suggested that the likelihood that markets will evolve if a duty of payment is imposed obviates most concerns with preserving markets and conserving judicial resources. Once the weight of these two concerns (autonomy and systemic costs) is lightened, it is arguable that the postulated moral right to reward may be heavy

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119. Note that the author is not the only person who causes her work to have value; the work's value (the "benefit" it yields) also depends on the audience's capacity to appreciate and demand it. Even the usually cited source for natural law defenses of property—John Locke—did not subscribe to a labor theory of value. See Karen Iversen Vaughn, John Locke: Economist and Social Scientist 17-45, 85-90 (1980).

120. See Restatement of Restitution, *supra* note 9, § 112, comment (b).

121. See *id.* §§ 112-17; Restatement (Second) of Restitution § 3 (Tent. Draft No. 1 1983) ("benefit conferred through justifiable response to exigency"). At one point the authors of the first Restatement hint that the presence of exigency may even put into place a presumption *in favor* of rewarding volunteers, so long as they are not officious (have some good reason for volunteering) and intend to charge for their services. See Restatement of Restitution, *supra* note 9, § 112 , comm. *b* , at 463 ("Exceptional situations").

enough to assert itself even without proof of exigency or significant economic need. If this is so, then intellectual property protection that is broader than pure incentive considerations would justify *may* be consistent with the common law patterns: many commentators see such mixtures of desert and social policy arguments operating in the law of copyright.[122] However, it cannot be proven that the restitutionary right of action is independent of economic considerations, since in the typical case involving an intellectual product the autonomy and systemic cost arguments just mentioned will be accompanied by a plausible claim that assuring plaintiff a right of action will yield desirable incentives.

IV. CONCLUSION

In general outline, statutory intellectual property's pursuit of benefit-production is not inconsistent with the common law's pattern of entitlements. Though the common law of tort imposes no duty to generate benefits and imposes no liability on those benefited by others' efforts to behave reasonably, these patterns are explained by considerations that have few negative implications for intellectual property.

Restitution is an area notoriously governed by "pockets" of rules and judges unwilling to generalize.[123] Nevertheless, one can identify the primary concerns that in restitution law militate against a cause of action, and these concerns are lessened in the case of intellectual property: legislatively defined rights over intangibles are unlikely to displace otherwise available market avenues and, if coupled with advance specification and demarcation, are unlikely to cause defendants to be harmed by an intellectual product producer's assertion of a right of action. Further, legislative specification can help calm the fear of slippery-slope problems that (along with restitution's procedural history) may have contributed to the atomism of restitution law.

All of this does not "prove" that intellectual property is consistent with the common law. Among other things, the broad scope of the statutory exclusive rights and the injunctions permitted under current intellectual property statutes may not be justifiable by recourse to the common law pattern.[124] Further, patent proprietors are permitted to sue even persons who, without copying, happen to invent something that duplicates the patented invention; though potentially this

122. See 2 Paul Goldstein, Copyright, at 5, 685-86 (1990) and *id*. at vol. 1, 8-9; also see Gordon, *supra* note 1, at 1438 (suggesting "that the [copyright] system serves economic goals and employs markets to achieve a rough compromise between authors' claims to reward and the public's needs," and distinguishing that from the view that "intellectual property rights for creators are only justifiable when the public gains something it would not otherwise have had").

123. This is changing; even English jurisprudence now seems to accept the notion that a variety of disparate cases exhibit similar enough themes to constitute a restitution subject category. See Lord Goff of Chieveley & Gareth Jones, The Law of Restitution *v* (3rd ed. 1986).

124. In addition, in those cases where a patent suit is premised not upon copying but upon mere duplication, restitutionary principles would not support a cause of action.

rule is justifiable in terms of providing incentives, it has little parallel in the common law pattern. I leave to other fora the questions of whether the use of common law analogy could yield precise components and limitations for judge-made intellectual property causes of action,[125] whether statutory intellectual property patterns have good ground for departing from the restitutionary model, and whether other bases exist for distinguishing between harm and benefit.[126] This article has concerned itself with how some traditional doctrines of tort and restitution have dealt with the imposition of rights and duties to encourage the production of benefit. The article concludes that despite an apparent asymmetry in its treatment of positive and negative incentives, the common law would be hospitable to the creation of positive incentives in circumstances such as those faced by producers of intellectual products.

125. See generally Gordon, *supra* note 5, at section III (set of minimum constraints).

126. This article has suggested that the law is not hostile to the pursuit of positive incentives; that it may favor giving such incentives; and that the law may even recognize a noneconomic (moral) duty to pay for benefits conferred. But nothing in the preceding discussion proves that the law gives equal status to positive and negative incentives, or that moral duties to pay for benefits received are as strong as moral duties to refrain from doing harm. In fact, restitution's reluctance to impose net harm on defendants may suggest that judges believe a duty to pay for benefits received is *weaker* than a duty to refrain from harm; see, e.g., Gordon, supra note 5 at 205-11. Also outside the immediate scope of this article is the constitutional law literature on the harm/benefit distinction, represented most recently by Jeremy Paul, The Hidden Structure of Takings Law, 64 S. Calif. L. Rev. 1393 , 1433-64 (1991).