Rudolf Callmann and the misappropriation doctrine in the common law of unfair competition

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Keywords

Abstract
Rudolf Callmann (1892-1976) is a central figure for unfair competition lawyers in both the German civil law and the Anglo-American common law traditions. When he emigrated from Germany to America in the 1930s he was already the author of substantial works on trade marks, unfair competition, and cartel law. In the United States he composed the monumental Callmann on Unfair Competition, Trademarks and Monopolies. This article examines his invocation of the 1918 decision of the Supreme Court in International News Service v Associated Press as the basis for a reformulated common law of unfair competition, eschewing a purely tortious conception of unfair competition centred on misrepresentation and damage, in favour of one which embraced liability for misappropriation and unjust enrichment.

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Introduction

Rudolf Callmann

IDEAS ARE weapons, they are the soil on which we grow, they are the lifeblood of competition, and the theft of ideas is the lifeblood of unfair competition. Many a new industry and many a fortune has been built upon a properly exploited idea. But what protection does the law give to the idea itself? Unfortunately, very little.¹

This quotation gives some idea of the special interests and legal philosophy of Rudolf Callmann, not to mention his fondness for violent and occasionally sanguinary metaphor. Callmann's life-long interest was the law of unfair competition, and one of the causes for which he fought was protection against the misappropriation by business competitors of ideas and information of every kind. His personal legal philosophy was that business competitors should constantly and untiringly strive to get ahead—but that they should do so exclusively through their own independent and socially beneficial exertions, eschewing aggression and imitation alike. Any competitive act which was directed against a competitor potentially offended against this principle of Leistungswettbewerb, or "constructive effort", as did any act by which one competitor sought to benefit from the efforts or achievements of another—or as Callmann himself put it:²

"'Constructive effort' [Leistungswettbewerb] is the effort of a man who strives to obtain commercial advantages only by the honestly exercised means of his own strength, his own ingenuity, skill, and capital."

Needless to say this is altogether too idealistic for English law,³ however attractive it may sound in theory, and in England Rudolf Callmann and his theories are little known outside academic circles. More to the point, Callmann ultimately failed to persuade Americans that this was an appropriate model for their own law, though certainly not for lack of trying.

In comparison to his relative obscurity in England, Rudolf Callmann was very well known in America for his multi-volume treatise The Law of Unfair Competition and Trade-Marks,

³ “To draw a line between fair and unfair competition ... passes the power of the Courts." Mogul Steamship Co Ltd v McGregor, Gow & Co (1888) 21 Q.B.D. 544, C.A., per Fry L.J. at 630.
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originally published in 1945 and still in print (and online) as Callmann on Unfair Competition, Trademarks and Monopolies. In this article, I propose to concentrate on Callmann’s treatment of one theme, and indeed on one case, which is the decision of the United States Supreme Court in International News Service v Associated Press. Callmann’s self-imposed mission was to convince America not only that the International News decision was rightly decided on its own facts, but that it provided the basis for a complete realignment of the law of unfair competition in terms of misappropriation rather than misrepresentation.

Callmann’s life and work

Callmann was born into a liberal Jewish family in Germany in 1892. He studied at the universities of Bonn, Berlin and Freiburg, and practised law with his father and brother in his home city of Cologne between 1923 and 1936. His practice was centred on trade mark and unfair competition law, in which he rapidly became an acknowledged expert. He was also politically active. He was a member of the Presidium of the Central Verein deutscher Staatsbürger jüdischen Glaubens, and in 1933, in response to the rise to power of the Nazi Party, he was one of the founder members of the Reichsvertretung der deutschen Juden. He was able to continue in his legal practice after 1933 only because of his front line service in the First World War, but by 1936 life in Germany had become intolerable, and he emigrated to the United States of America to enrol at Harvard Law School as a research fellow under Professor Zechariah Chafee, Jr., and to re-qualify for American practice. He was naturalised as an American citizen in 1943, the year in which he re-qualified as an attorney, and practised as a

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6 (1918) 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211. For a recent application of the principle of International News to entirely new technologies, but otherwise to very similar facts to those obtaining in 1918, see Associated Press v All Headline News Corp 608 F.Supp. 2d 454, (S.D.N.Y., 2009), refusing to dismiss common law claims against an internet site for misappropriation of AP’s “hot news”.
7 The main published source of information on Callmann’s life and work is Theodore Baums, “Rechtsnorm und richterliche Entscheidung im Wettbewerbsrecht—Der Beitrag Rudolf Callmanns zur deutschen und amerikanischen Rechtsentwicklung” [1992] GRUR Int 1; also published under the same title in Marcus Lutter et al. (eds) Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland: Vorträge und Referate des Bonner Symposions im September 1991 (Tübingen: Mohr, 1993) at p. 63. This includes a complete bibliography of Callmann’s German and English language publications. There are obituary notices in the New York Times (March 15, 1976, p. 33), and at (1976) 66 Trademark Reporter 96.
member of the New York bar until his death in 1976.\textsuperscript{8} Before his enforced emigration, however, Rudolf Callmann had already written an important and well-received treatise on the German law of unfair competition,\textsuperscript{9} which went into two editions in three years,\textsuperscript{10} as well as one on the German cartel law.\textsuperscript{11}

My own interest in Callmann’s life and work is three-fold. First, as the author of a much less ambitious text in Callmann’s own field of unfair competition law,\textsuperscript{12} I am naturally interested in how my understanding of the law compares with his. Secondly, as an author and former practitioner turned academic I am intrigued by the question of just how influential legal authors really are, if at all, and how their ideas are received into the mainstream of legal opinion. My own views on my subject, I have always thought, are almost entirely orthodox, if perhaps over-systematised for common law tastes; but Callmann intrigues partly because he brought to America, and did not hesitate to expound, a legal philosophy which was at once entirely his own, and in many ways characteristically German.

This leads to my final point of interest, which might be called the Diaspora effect, with or without the upper case “D”. Laws can be spread by a deliberate process of legislative reception, as has happened with the adoption of laws based on the German Unfair Competition Act in Central and Eastern Europe twice in the past Century, initially in the period between the adoption of the German Act in 1909 and the Second World War, and more recently with the end of Communism and the enlargement of the European Union;\textsuperscript{13} but there always remains the problem of whether the law in question is being reproduced in spirit, or only in the letter. Conversely, the British Empire affords the example of the common law being transplanted to countries as diverse as Canada, South Africa, India, Hong Kong, and Australia—not to mention the United States of America—sometimes in complement or opposition to antecedent Civil law traditions, as well as pre-existing indigenous laws and customs. In this

\begin{footnotes}
\item[8] “Rudolf” or “Rudolph”, and “Callmann” or “Callman”? The anglicised surname with the single final “n” is found occasionally, but so infrequently that it is almost certainly inauthentic. “Rudolph” is not uncommon in the American period, but by no means invariably so, and Callmann himself seems to have preferred “Rudolf”. For consistency, I use the German forms throughout.
\item[9] Rudolf Callmann, \textit{Der Unlautere Wettbewerb} (Mannheim: Bennesheimer; 1929).
\end{footnotes}
case, the reception of the law has typically been effected or accompanied by a secular diaspora of lawyers trained in the common law tradition. Then there is a third category in which one looks to the influence of individual lawyers who have moved from one jurisdiction to another, though the cumulative effect may exceed that of each individual alone. Rudolf Callmann is particularly interesting as embodying in one person the Diaspora of Jewish and other liberal German lawyers from the Third Reich in the 1930s, especially to the United States of America.

When Callmann left Germany in 1936, he took with him an approach to unfair competition law which had been refined in the two editions of what may fairly be called the masterwork of his German period,\textsuperscript{14} and which had in turn been informed by nearly two decades’ professional experience of the German Unfair Competition Law of 1909.\textsuperscript{15} The country to which he emigrated had laws against cartels and monopolies which dated back to the Sherman and Clayton antitrust acts of 1890 and 1914,\textsuperscript{16} but no comprehensive statutory or common law prohibition on acts of unfair competition. Unlike the position in United Kingdom, though, the term “unfair competition” was at least widely accepted in the United States, the problem being that it had too many incompatible meanings. At one extreme, “unfair competition” was little more than an accepted synonym for passing-off; at the other, it embraced anti-trust offences and other unspecified violations of the economic order which the Federal Trade Commission was empowered to investigate and redress.\textsuperscript{17} But in terms of general civil liability there was nothing remotely resembling the German Unfair Competition Act.

Cast adrift in a strange land, with nothing to support him except his own considerable ability, and his even more formidable determination, Callmann was anything but dismayed. Like the Pilgrim Fathers before him, he stilled any complaints he might have felt about the sparseness and unfamiliarity of the indigenous flora and fauna, sharpened his sickle, and set to work with a will. By German legal standards the landscape which confronted him was almost as barren and sterile as the rockbound shores of New England, but there was one exception which, once harvested, was fit to provide grist for Rudolf Callmann’s mill.

\textsuperscript{14} Callmann, \textit{Der Unlautere Wettbewerb}, 1929 and 1932.

\textsuperscript{15} The \textit{Gesetz gegen den unlauteren Wettbewerb} of June 7, 1909.


The International News decision

The facts of the case

The case with which this article is principally concerned is the decision of the United States Supreme Court in *International News Service v Associated Press.* Both parties were American news agencies, with Associated Press, the older and larger, being organised as a co-operative with restricted membership, and International News, the relative newcomer, being an ordinary commercial company owned by the media magnate William Randolph Hearst. Hearst’s outspoken opposition to American involvement in the First World War earned him the reputation of a German sympathiser in the eyes of the British Government, and in the Autumn of 1916, while America was still neutral, his newspapers and news agency were banned from receiving Allied press briefings, which under censorship were the only regular source of war news, and from using the transatlantic cables, which were the only fast and reliable means of communication between Europe and the United States. With Hearst and his papers effectively cut off from the most important source of foreign news, his International News Service resorted to various subterfuges to replace the missing bulletins, some of them ethically questionable, and some undoubtedly illegal. Edward S. Rogers, one of the pioneers of American trade mark and unfair competition law, once told of the student who had summed the subject up in the words: “Well, it seems to me that the courts try to stop people from playing dirty tricks.” In the case of journalism, the *Book of Dirty Tricks* had been commissioned, authored, edited, revised, illustrated, printed, and published by William Randolph Hearst, with his full-colour portrait as its frontispiece.

Some historical background

Perhaps surprisingly, the most informative approach to *International News* is by way of a later decision of the Supreme Court involving only one of the parties, namely *Associated Press v United States,* an antitrust case from 1945. The latter decision is particularly relevant because

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18 (1918) 248 U.S. 215.
22 (1918) 248 U.S. 215.
of the light it sheds on how Associated Press actually operated, in ways which had not changed significantly since 1900 and which are highly relevant to the litigation against International News. It is one of several paradoxes of Callmann’s extensive writing about International News that although he included antitrust law alongside trade marks and unfair competition in his American treatise,\(^{24}\) in the belief that legal regulation of the market could not properly be understood without reference to them all, he all but ignored the antitrust aspects of the International News case itself when it came to extracting the principles of a law of unfair competition from its precepts. But then the factual background of International News never did much concern Rudolf Callmann,\(^{25}\) and it is as if he was interested in the case solely as the source of a particular legal principle, to which the actual facts of the case contributed very little of relevance.\(^{26}\)

Associated Press may or may not have been a “trust” before 1945, whatever that may mean, but it was certainly a closed shop. In 1918 it had around 1000 members.\(^{27}\) The way the rules operated was that applications for membership from newspapers which did not compete geographically with existing members were referred to an executive committee, and were readily allowed. Applications from geographical competitors of an existing member were subject to the existing member exercising a right of protest at their admission, in which case they were referred to the entire membership, with a four-fifths majority in favour of admission being required. What happened in practice was that these applications were almost invariably voted down.\(^{28}\) This may seem economically self-defeating, since the costs of Associated Press were mainly fixed, and it was surely in the interests of all the members to spread them as


\(^{25}\) One might do worse than quote Callmann’s summary of the purported facts of the case in an article for a German readership, quoted by Baums, “Der Beitrag Rudolf Callmanns” [1992] GRUR Int 1 at fn. 46, if only for his gratuitous introduction of Chicago as the *locus delici commissi*, and his substitution of the telephone for the telegraph: “Ein Nachrichtenbüro in Chicago nutzte den Zeitunterschied zwischen Chicago und New York aus, indem es sich von einem Vertreter in New York die neuesten Nachrichten nach Chicago telefonieren ließ, nachdem dieser sie den Zeitungen entnommen hatte, die von einer anderen Nachrichtenagentur gespeist waren; ein typischer Fall von Ausbeutung fremder Arbeit.”

\(^{26}\) In fairness to Callmann, the 1945 antitrust decision came too late for his principal journal articles, and his US textbook did not fully deal with anti-trust law until the 3rd edition (1967), by which time his thoughts on International News were fully formed.

\(^{27}\) Give or take 50 or so: (1918) 248 U.S. 215 at 217, 249.

\(^{28}\) To be precise, just six papers were admitted under this procedure, all in special circumstances: John H. Lewin “The Associated Press Decision: An Extension of the Sherman Act?” (1945) 13 University of Chicago Law Review 247, 249 at fn. 10, and 253. Meanwhile, the original 600 “charter members” had welcomed in some 1,900 new entrants in total, although after allowing for resignations, mergers and closures, membership in 1945 stood at about 1,200.
widely as possible, but the members of Associated Press were past masters of game theory
*avant la lettre*. To be the sole Associated Press member in a particular city or geographical area
gave a newspaper proprietor an important competitive advantage: Associated Press was not the
only source of national and international news, but it was the largest and most comprehensive
by far. For any individual newspaper to forfeit this advantage for the trivial financial benefit of
sharing fixed costs between 1001 members rather than 1000 was commercial suicide, and
everyone knew it might be their turn next. Half a century before *The Logic of Collective
Action*29 the members of Associated Press understood Olson’s theory perfectly, and conducted
themselves accordingly.

**The course of the litigation**

Melville Stone, the General Manager of Associated Press, was something of an amateur lawyer
by inclination, and passionately committed to the idea that news was protected by law like any
other kind of property.30 Quite apart from his desire for a test case to establish this proposition
as a formal legal precedent, Stone also had a longstanding quarrel with Hearst. As the owner of
International News, Hearst was a competitor of Associated Press, and not an unduly scrupulous
one. As a newspaper proprietor in his own right, and an active political figure, Hearst already
had the reputation of a dangerous and unpredictable megalomaniac, who practised the worst
kind of sensational “yellow press” journalism. He was the owner of daily papers in nearly a
dozen American cities, and three of these—in New York, Los Angeles and San Francisco—were
members of Associated Press, which enabled Hearst to play the part of a maverick from within
Associated Press, while competing with it from outside. Stone, on the other hand, not only
regarded the news gathered and circulated by Associated Press as the latter’s property and
patrimony, but tended to behave as if Associated Press itself were his own personal fief. Stone
managed the Associated Press in a spirit of high-minded and public-spirited paternalism, but
without much regard to efficiency, modernity, or diversity of viewpoint. The Associated Press, to
Stone, was as the BBC would be to Lord Reith.

In the Autumn of 1916 a golden opportunity was presented to Stone to bring his long-awaited
test case, and to cut Hearst and his International News Service down to size at the same time.
For several years previously a telegraph operator named Benjamin Cushing, employed by an
Associated Press member in Cleveland, Ohio, had been bribed by a journalist at International
News to pass on news items from the Associated Press bulletins. Quite coincidentally the

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(Cambridge, MS: Harvard University Press; 1965).

International News reporter responsible for this arrangement had been demoted for slacking, and had taken his revenge by confessing everything to Associated Press, just at the time when International News was being barred from Europe.\textsuperscript{31}

Stone and his lawyers took their time to put a watertight case together, and in January 1917 Associated Press sued International News in the Federal Court for the Southern District of New York, and applied for various interlocutory injunctions. The first injunction sought was to restrain the continuing use of news leaked from Cleveland. The actual importance to International News of this particular source may be judged from the amount of the bribe—just $5 a week—but the fact that a bribe was being paid at all, and with the approval of quite senior managers, showed International News in the worst possible light and got the case off to a splendid start for Stone. The claim to the second injunction depended on the fact that although Associated Press and International News were commercial rivals, one of the three Hearst titles which were members of Associated Press was his New York American, which was edited from the same building in which International News was based. Perhaps not surprisingly, there was incontrovertible evidence of occasions on which reporters from International News had been allowed access to Associated Press bulletins immediately on receipt by the American, and before they were published, in flagrant contravention of the American’s terms of membership of Associated Press.\textsuperscript{32} Finally, it was alleged in very general terms that International News made a practice of copying published Associated Press news items from the public bulletin boards and early morning editions of subscribing East coast papers, and telegraphing the contents to their mid-Western and West coast subscribers in time for publication in their own early editions.\textsuperscript{33}

So far as the first two scenarios were concerned, Associated Press had prepared its case well, and was able to prove it up to the hilt, with legal liability following almost automatically. It was the third scenario which created the greatest conceptual difficulties, but which seized the attention of the courts at the time, and has provided commentators with a single focal point of attention ever since. Ironically so, since no evidence was given by Associated Press to support this particular claim. The nearest evidence of even marginal relevance was that two essentially

\textsuperscript{31} \textit{Associated Press v International News Service} (1917) 240 F. 983 (District Court, New York) at pp. 986 et seq; Baird “The Story of INS” in Intellectual Property Stories, 2006, at pp. 21-23.


trivial news items published in East Coast morning papers had apparently been copied and reproduced in certain evening papers, also on the East Coast, later the same day.\textsuperscript{34} Although Associated Press was certain its bulletins were being copied by International News, it could not allege copyright infringement. Federal copyright law at the time required prior registration, and public notice, if copyright was not to be forfeited on publication; and compliance with these formalities for every news item, day in and day out, was out of the question.\textsuperscript{35} In any event, it was far from clear that International News would have infringed any statutory copyright, since more often than not it would have been the underlying facts, rather than any particular journalistic expression of them, which International News would have copied. Associated Press were therefore driven to pitch their case somewhere between infringement of a novel, non-statutory, quasi-proprietary right which was not a copyright; and unfair competition, in a sense not previously recognised in American law.

At first instance, Judge Augustus N. Hand readily granted interim injunctions against the first two practices. So far as the third practice was concerned, he condemned it as unethical, and extended his disapproval to what Associated Press themselves admitted doing in terms of using rivals’ news items—sometimes published, sometimes not—as “tips” to be followed up by their own reporters.\textsuperscript{36} However, Judge Hand was unwilling to enjoin International News in this respect, on an interlocutory application, when to have done so would have made new law.\textsuperscript{37} The majority in the Court of Appeal for the Second Circuit had no such qualms, and added a third injunction to the two previously granted.\textsuperscript{38} International News were granted certiorari by the Supreme Court.\textsuperscript{39}

\textbf{In the Supreme Court}

The Supreme Court was divided, but the majority upheld the injunction. Speaking for the majority, Justice Pitney said:\textsuperscript{40}


\textsuperscript{37} \textit{Associated Press v International News Service} (1917) 240 F. 983, 996.

\textsuperscript{38} \textit{Associated Press v International News Service} (1917) 245 F. 244, 253 (Second Circuit Court of Appeals, Judges Rogers and Hough; Judge Ward dissenting in part).

\textsuperscript{39} Grant of certiorari: (1917) 245 U.S. 644.

\textsuperscript{40} \textit{International News v Associated Press} 248 U.S. 215, 239. Italics are not Justice Pitney’s own, but follow those supplied by Callmann, \textit{Unfair Competition}, 1945, §60.1 at pp. 724-25, likewise the ellipsis.
“The fault in the reasoning [that the plaintiffs’ rights were lost upon publication] lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant’s right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant … is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant’s legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.”

But what particularly caught the attention of the Court then, and has continued to fascinate followers of the case ever since, was the precise form the unfair competition took.41

“The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. … Most of the foreign news reaches this country at the Atlantic seaboard, principally at the City of New York, and because of this, and of time differentials due to the earth’s rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant’s news from bulletins or early editions of complainant’s members in the eastern cities and, at the mere cost of telegraphic transmission, cause it to be published in western papers issued at least as early as those served by complainant.”

So with the same inevitability as night follows day, whatever International News copied from Associated Press in New York would be on sale in San Francisco and Los Angeles as soon as, or even before, the original article. If this was not “unfair” competition, then what was? And if Associated Press had been minded to defend themselves without recourse to law, or even to reply in kind, then what on Earth could they have done? The Earth they stood on rotated too, but there was nothing they could do to neutralise the competitive advantage its rotation gave to Hearst, let alone to halt or reverse its motion for their own benefit.

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41 248 U.S. 215, 235.
Of the rest of the Supreme Court, Justice Holmes (with whom Justice McKenna concurred) would have found for Associated Press on much more limited grounds, but the majority entirely concurred with Justice Pitney. Justice Brandeis dissented. Although he agreed that the injustice of International News’ course of conduct was obvious, Brandeis alone was anxious about the unpredictable side-effects of the kind of judicial legislation which would have been required to give Associated Press the rights and remedies they demanded.

The reception and rejection of *International News*

Taken to the full extent of its implications, the majority judgment in *International News* would surely have created something approximating to an all-embracing shadow system of common law intellectual property rights, extending far beyond the familiar regimes of copyright, patents, designs and trade marks, and all without any Constitutional mandate, or any legislative or administrative supervision. An English reader of a later day might well have objected that Justice Pitney’s judgment—once “stripped of all disguises,” as he would surely have wanted—amounted to nothing less than “a naked usurpation of the legislative function” in an area where the authors of the Constitution had chosen to clothe the Congress with the power to legislate.

Not surprisingly, the courts rapidly drew back from any such interpretation. The Old Dominion was the first to raise the rebel yell against this latest example of Federal tyranny, and the Second Circuit, which had led the original charge, was not slow in beating the retreat. The *International News* decision was barely ten years old when the Second Circuit ruled, in *Cheney Bros v Doris Silk Corporation*, that notwithstanding *International News* there was no liability in unfair competition for copying each season’s most fashionable designs for silk ties:

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42 248 U.S. 215, 246.
44 248 U.S. 215, 262.
46 248 U.S. 215.
47 *per Viscount Simonds in Magor and St Mellons R.D.C. v Newport Corp*n [1952] A.C. 189, HL, 190.
48 Constitution of the United States (1787) Article 1, Section 8, Clause 8.
49 *Crump Co, Inc v Lindsay, Inc* (1921) 130 Va. 144, 107 S.E. 679.
50 *Cheney Bros v Doris Silk Corporation* (1929) 35 F.2d 279 (Court of Appeals, Second Circuit) *per Judge Learned Hand.*
“Of the cases on which the plaintiff relies, the chief is *International News Service v Associated Press* .... Although that concerned another subject-matter —printed news dispatches—we agree that, if it meant to lay down a general doctrine, it would cover this case; at least, the language of the majority opinion goes so far. We do not believe that it did. While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us such an instance; we think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter.”

Within a few years of *Cheney*, if not before, *International News* was being treated as an anomaly, or even as a pariah, a precedent which neither recognised nor created any general principle, and which was to be followed, and then only with the utmost reluctance, only in cases which were utterly indistinguishable on the facts. But if *International News* did not stand for any such general principle, then it was hard to say just what it did stand for. There was no obvious middle ground. It seemed all but impossible to find any credible but suitably restrictive rationale which would justify the decision on the facts, and no more than that.  

**Callmann’s law review articles, 1940-42**

**Rudolf Callmann's theory of unfair competition**

Rudolf Callmann’s thoughts on the law of unfair competition in general, and on the *International News* case in particular, may be traced through a series of three articles in American law reviews, of which the final and most seminal one was his 1942 *Harvard* article, and into the successive editions of his American textbook. However, for an insight into his underlying philosophy, one should ideally begin with the first edition of his original

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51 The combined effect of two Supreme Court decisions in 1938 was to render *International News* even the more irrelevant, at least for the time being. First, *Erie Railroad Co. v Tompkins* (1938) 304 U.S. 64 decided that there was no “general Federal common law”, thereby depriving the actual decision in *International News* of the legal basis it was previously assumed to have had; then, in *Kellogg Co v National Biscuit Co* (1938) 305 U.S. 111, the Supreme Court, speaking through Justice Brandeis, silently declined to reinstate, or even recognise, the *International News* doctrine.

52 (1918) 248 U.S. 215.

53 i.e. the *Georgetown* and *Harvard* articles (above, fn. 2). The trio is completed by the less important *Louisiana* article: Rudolf Callmann, “Copyright and Unfair Competition” (1940) 2 *Louisiana Law Review* 648.

German work. Quite literally so, with the very introductory words to the first chapter, in which Rudolf Callmann proclaimed his own competitive *credo:* \(^{55}\)

“‘Immer der erste zu sein und voranzustreben den andern’ kann als allgemeine Umschreibung dessen gelten, was man überhaupt unter Wettbewerb versteht, bedeutet aber in engerem Sinne das Wettstreben in seiner idealen Form, den reinen Leistungswettbewerb, in dem der Schaffende, wenn auch um des Preises willen, nur die Vervollkommnung der eigenen Leistung erstrebt und dem mitstreben nur Beachtung schenkt, um aus dem Vergleich der beiden Leistungen Ansporn zu gewinnen.”\(^{56}\)

*Leistungswettbewerb,* which defies ready English translation,\(^{57}\) was supposedly of Callmann’s own invention, at least in name,\(^{58}\) and seems to have encapsulated a personal philosophy, the *Leistungsprinzip,* as well as being his prescription for competition which was both fair and socially beneficial. In the precise German quotation chosen by Callmann, it recalls the great Swiss cultural historian Jacob Burckhardt, for whom it perfectly embodied the Greek principle of *agôn*, for which such modern English terms such as “competition” or “rivalry” are but weak echoes.\(^{59}\) Burckhardt himself took it from Homer’s *Iliad,* where the fathers of both Glaucus the

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\(^{56}\) In free translation by the present author: “‘Always to be the first, and by striving to stay ahead of all the others’. This saying can apply as a generalisation whenever one talks about competition in any of its aspects, but in a narrower sense it denotes the spirit of competition for its own sake, and, in its ideal form, the pure concept of *Leistungswettbewerb,* in which the pioneer, even in pursuit of the prize, relies only on the perfection of his own performance, and pays attention to his fellow competitors only in so far as the comparison of his performance with theirs spurs him on to victory.”

\(^{57}\) See above, fn. 2. One problem with which Callmann would have been mercifully unconcerned in 1940 is that of avoiding confusion with the “productive achievement” of Ayn Rand.

\(^{58}\) Callmann, “Unfair Competition” (1940) 5 *Georgetown Law Journal* 585, 601, fn. 44. Callmann (ibid.) translates *Leistungswettbewerb* as “constructive effort”. Professor Ohly questions whether Callmann really originated the term. There is no doubt that the concept as such antedated Callmann, and was widely current well before 1929. Its former centrality in German unfair competition law is generally attributed to Hans Carl Nipperdey, *Wettbewerb und Existenzvernichtung (Eine Grundfrage des Wettbewerbsrechts)* (Berlin: Carl Heymanns, 1930) and the decision of the Reichsgericht in the *Benrather Tankstelle* case of December 18, 1931 (RGZ 134, 342), but Baums, *Der Beitrag Rudolf Callmanns* (above, fn. 7), notes that Callmann’s threefold categorisation into “Leistungswettbewerb”, “Suggestionswettbewerb” and “Gewaltwettbewerb” antedated Nipperdey’s two-fold division into “Leistungswettbewerb” and “Behinderungswettbewerb”, even if the latter proved more influential in the longer term. See also below, fn. 229.

Rudolf Callmann and the misappropriation doctrine

Lycian, for the Trojans, and Achilles, for the Greeks, had exhorted their sons to glory in precisely the same terms: “αἰὲν ἄριστεύειν καὶ ὑπείροχον ἐμεναι ἄλλων”.

On the most straightforward level, Callmann’s thesis therefore prescribes that everyone engaged in competition should succeed by their own unaided efforts—just like the competitors in a boat race—and by those efforts alone, though there is rather more to it than that. At the very end of his career, Callmann was to compare business competition to another kind of race:

“The competitive contest is more like the horse race than the prize fight. The contestants in the prize ring strive to knock one another out. The contestants in the horse race vie with each other for the victory, and though the race is to the swiftest, it is governed by rules intended to assure each entrant a fair chance at the prize. Any infraction of the ‘rules of the game’ by drugging a horse or fixing the race, violates the conditions of fair play applicable to all. … And so it is in business competition.”

It is easy to see why Rudolf Callmann should have seized upon International News as the fulcrum for the argument with which he hoped to move the whole of the United States over to his own theory of unfair competition. Not only did International News repudiate the common law status quo, with its narrowly-formulated and strictly differentiated torts of misrepresentation such as passing-off and malicious falsehood, and replace it with an apparently open-ended doctrine centred on misappropriation; but it did so in terms which explicitly lauded innovation and investment, and decried reliance on the efforts and financial expenditure of those who had gone before. Here, it must have seemed, was an ideal example of Leistungswettbewerb at its purest, and its antithesis at its most contemptible, matched in fair competition with one another before the highest Court of the land, and for once the more deserving of the two antagonists had prevailed. It was straight out of the first Act of Wagner’s

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60 “Always to be best, and to be distinguished above the rest.” Homer, The Iliad Book VI, line 208, and Book XI, line 784. Described by Callmann (Georgetown Article, page 601, fn.45) as “the unsurpassable exposition of the ideal of an age of sportsmanlike fighting.” (This translation from the Oxford Dictionary of Quotations (Oxford: Oxford University Press; 7th ed, 2009)).


62 Rudolf Callmann, “Unfair Competition and Antitrust: Coexistence within Complementary Goals” (1968) 12 Patent, Trademark and Copyright Journal of Research and Education (IDEA) (Conference Issue) 137, 138. Callmann’s invocation of a horse race was a topical allusion, rather than a change of substance. The winner of the 1968 Kentucky Derby, Dancer’s Image, had just been disqualified for failing a drug test, in a decision which is still enveloped in controversy.

63 (1918) 248 U.S. 215.
Lohengrin,\textsuperscript{64} or better still, the ordeal by battle scene in Sir Walter Scott’s \textit{Ivanhoe}.\textsuperscript{65} The only problem was that America’s lawyers had failed ever since to recognise the proper significance of this decision of their own Supreme Court.

\textbf{Callmann’s legal heritage and the German Unfair Competition law}

Callmann’s indebtedness to \textit{International News}\textsuperscript{66} may be self-evident, but it can hardly account for the whole of his legal philosophy, especially as there is every indication that the latter was formed well before he left Germany. So to what extent was he drawing on an indigenous American or common law tradition, and to what extent on values and schemata which he had brought with him from Europe, or which he had worked out for himself in his new environment? In terms of Callmann’s strictly legal heritage, it is of course a truism that concepts of unjust enrichment and restitution were far closer to the mainstream of legal thought in the Civil law tradition of Germany, than in England or the United States.\textsuperscript{67} However, above all there was the German Unfair Competition Act of 1909, to which no legislation in the United States remotely corresponded.

Competition had largely been unregulated in Germany between the demise of the guild system in Napoleonic times, and the passage of the first (Federal) Act Against Unfair Competition, in 1896. The latter proved to be quite inadequate to the task. It was replaced in 1909 by the Act which remained in force until 2004.\textsuperscript{68} To the eyes of the common lawyer, one of the most striking features of the 1909 Act was its General Clause:\textsuperscript{69}

\begin{quote}
“In Germany, the statute law of unfair competition contains some specific provisions against such practices as false advertising, bribery, defamation, and disclosure of trade secrets. But the general clause of the statute has been the foundation of the German law of unfair competition, and the other sections have been relatively neglected. This clause states:

\begin{quote}
\textit{Wer in geschäftlichen Verkehre zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstoßen, kann auf Unterlassung und Schadensersatz in Anspruch genommen werden.\textsuperscript{70}}
\end{quote}
\end{quote}

\textsuperscript{64} Richard Wagner, \textit{Lohengrin} (1848), Act 1, scene 2.

\textsuperscript{65} Sir Walter Scott, \textit{Ivanhoe} (1819), Chapter XLIII.


\textsuperscript{67} “Not long ago it could be said that the Continental lawyer approaching the topic of [unjust] enrichment in the common law ‘might be entering another world.’” Konrad Zweigert and Hein Kötz, \textit{Introduction to Comparative Law} (Oxford: Clarendon Press, 3\textsuperscript{rd} ed., 1996), at p. 551, expressly drawing attention to the situation at the time of the 2\textsuperscript{nd} (1987) ed.

\textsuperscript{68} The \textit{Gesetz gegen den unlauteren Wettbewerb} of June 7, 1909; repealed and replaced by the \textit{Gesetz gegen den unlauteren Wettbewerb} of July 8, 2004.

\textsuperscript{69} Callmann, “He Who Reaps Where He Has Not Sown” (1942) 55 \textit{Harvard Law Review} 595, 610. In the original German the internal quotation reads: “Wer in geschäftlichen Verkehre zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstoßen, kann auf Unterlassung und Schadensersatz in Anspruch genommen werden.”
‘An action for injunction and damages shall lie against any person who, in the course of business, engages in competitive acts contrary to good morals.’

Such provisions as these were revolutionary. Here there was no room for the continental judge to apply his ‘art of interpretation.’ There was no law stating the operative facts with certainty and precision, and determining the legal consequences to follow. It became the business of the judge to decide upon these things, just as it has always been the business of the judge under the common law. A system of precedent has arisen, a system which has made itself felt throughout the law.’

And decently changing the focus of attention for a fraction of a moment to a field of law on which he was not an authority, Callmann continued:

“The German Commerce Code, for example, after several decades of existence, was hardly more than a table of contents to the tremendous body of court decisions and the works of commentators, who enjoyed an authority not unlike that of the Roman jurisconsults. This enormous change was made necessary by the nature of the thing with which they were dealing—unfair competition. That nearly all countries on the Continent have adopted such a general clause for the adjudication of unfair-competition cases should be sufficient evidence that it is even more impossible in this field than in other branches of the law to anticipate the manifold acts which the ingenuity of businessmen may invent.”

Callmann himself, in the two editions of his German textbook, had contributed significantly to this phenomenon. He claimed to have introduced the term “Leistungswettbewerb,” which describes the constructive model of competitive activity extolled in his Georgetown article, as well as its antithesis “Gewaltwettbewerb”. In due course the latter term was generally softened to “Behinderungswettbewerb”, for competitive acts intended to handicap or obstruct a competitor. It may even be said that the Leistungsprinzip became accepted—at least for a time—as one of the fundamental principles embodied in the General Clause.

However, the antinomy between Callmann’s Leistungswettbewerb and Gewaltwettbewerb had little or nothing to do with misappropriation per se, at least as long as the defendant was not damaged or obstructed by the act under consideration. The German term for (unfair)
exploitation of another's work is “Leistungsübernahme” or, more pejoratively, “Ausbeutung”. Callmann would undoubtedly have included International News in this category, but at the end of the 1930s misappropriation as a self-sufficient basis for statutory liability under the Act of 1909 was relatively unknown in German unfair competition law as actually practised, and its relevance was mainly confined to the field of “slavish imitations” (“sklavischen Nachahmung”) of mechanical gadgets, where an essential part of the justification for protection was that the article in question had acquired a reputation in the market. This was very far removed from the situation of International News. Moreover, German jurists, like their American counterparts, seem to have been acutely aware of the dangers of unfair competition law encroaching upon the carefully-balanced statutory intellectual property regimes. So by the 1930’s, when Callmann was forced to emigrate, unjust enrichment in this sense was not generally accepted as a sufficient basis for an action under the German Unfair Competition Act, although there was a body of academic opinion in favour of liability for Ausbeutung in certain circumstances, and a body of case law to support the theory in specific factual contexts. Moreover, Callmann himself seems to have believed that under his preferred analysis the action for unfair competition retained its character as a sui generis tort, even in the variant which depended more or less entirely upon misappropriation.

The Georgetown Article

The three articles which Callmann published in 1940-42 may be thought of as chips from the master’s workbench, fragments of work in progress from the Law of Unfair Competition and

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73 See Callmann, Unlautere Wettbewerb, 2nd ed., 1932, at p. 160 (“Ausbeutung fremder Arbeit”), and in particular at p. 170 (“Arbeitsausbeutung durch ungerechtfertigte Bereicherung”). The other major head of the doctrine, “Arbeitsausbeutung durch Täuschung des Publikums” (misappropriation by deception of the public), ibid. at p. 161, obviously had no direct application to International News, though Callmann was to champion the theory in the United States. Ausbeutung has survived into recent times as one of the five Fallgruppen into which liability for breaches of the Unfair Competition Act 1909 were traditionally divided.

74 Indeed in the passage cited above at fn. 25, he describes the case as “ein typischer Fall von Ausbeutung fremder Arbeit.” ("A typical case of misappropriation of the work of another.")

75 I am indebted to Professor Ansgar Ohly for some history and examples: In some of its early decisions the Reichsgericht had considered the exploitation of a competitor’s skill and effort to be inherently unfair (e.g. RGZ 73, 294, 297—Schallplatten; RGZ 115, 180, 183—Puppenjunge), but from the late 1920s onwards the court required “additional factors of unfairness” such as consumer confusion, the misappropriation of goodwill or a breach of confidence (e.g. RG GRUR 29, 483—Spielzeugsignalcheibe; RGZ 135, 385, 394—Künstliche Blumen).

76 For the state of the doctrine in the early 1930s see Callmann, Unlautere Wettbewerb, 2nd ed., 1932, at p. 165 ("Anhang. Der ‘Sklavische Nachbau’"). By requiring market reputation and confusion, the problem of slavish imitation became one of misrepresentation, as much as one of misappropriation.
Trade Marks which was to appear in 1945. However, they also make perfect sense as a self-contained but interconnected trilogy, and thanks to the internet they are probably rather more accessible to scholars today, than in their own time.

In his first article, “What is Unfair Competition”, Callmann attempted to deal from first principles with four paradigm situations: an example of false advertising which fell outside passing-off as it was then understood; a circular letter to customers falsely accusing a competitor of patent infringement; ruthless predatory pricing, combined with penetration and subversion of a competitor’s exclusive distribution network; and, in an example foreshadowing more detailed treatment in the following article, namely wholesale copying of a competitor’s catalogue of motor accessories. Rather than approach these individually, Callmann attempted to formulate a perfectly general theory of unfair competition which was broad enough to cover all these nominate situations, and more, without being tied to the factual scenarios of any of them.

Callmann attempted to erect his theory of unfair competition in seven stages. First, and almost by way of clearing the ground, he sternly criticised the then-prevalent prima facie tort theory, and the corresponding doctrine of “justification” for injuries inflicted on a competitor in trade. Having got rid of that, Callmann proposed that there were two relevant spheres of life: the ordinary everyday social sphere of the individual, which was governed by an order of peace and tranquillity, and the sphere of economic or business life, which was the scene of perpetual struggle. This was not to say that the struggle in the latter sphere was anything like as amoral and brutal as the state of nature envisaged by Thomas Hobbes in his Leviathan, in which force and fraud were the two cardinal virtues, nor was it analogous to the kind of total

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77 Much of the argument of the three articles was consolidated and incorporated into the first edition of Callmann’s American textbook. See Callmann, Unfair Competition and Trade-Marks, 1945, Chapter 2 “The Theory of Unfair Competition” §§4-8, pp 57-119.


80 i.e. the theory (simultaneously advanced in the late nineteenth Century by Frederick Pollock in England, and Oliver Wendell Holmes in America) that every intentional infliction of injury was prima facie actionable in tort, unless it could be said to be excused or justified.


82 Thomas Hobbes, The Leviathan (1660).
war fought between modern nations. On the contrary, competition in the economic sphere was
more like an organised game, in which everyone was obliged to play by the same set of rules.\textsuperscript{83}

These rules were ultimately rules of reason, and there was profundity, and not bathos or mere
rhetoric, in describing the law of unfair competition as “the rules of the business game”.\textsuperscript{84} The
law should therefore prohibit acts of competition which subverted the rules of the game, or the
established and accepted order of struggle. In particular, the law should encourage striving and
rivalry in the competitive struggle of economic life, but only to the extent that the striving was
of a constructive kind. Moreover, the participants in the “game” should ideally be motivated by
the pure spirit of competition and the desire to excel, and they should abjure the pursuit of
wealth for its own sake:\textsuperscript{85}

“The ideal type of modern business man is not the adventurer, the cut-throat
competitor, the highwayman—those pirates and chevaliers d’industrie play a
similar role in the history of this country as the knight robbers and condottieri in
medieval Europe—it is the man who does not want to make money for money’s
sake, but is deeply devoted to the idea of the calling who furthers his business
enterprise by dint of ascetic industry and scrupulous correctness. The spirit of
the ‘Codes of Ethics’ is the historical symptom of the force which inheres in the
new state of mind in American business life.”

So much for what should happen, but what was actually happening in practice?\textsuperscript{86}

“Nevertheless, the attack of every competitor, as we have seen, is directed
against the activity by means of which the others may gain the prize [i.e. the
end consumer’s custom]. The consequence of this injury is that business
competition tends to diminish or even destroy the productivity of the others.
Everyone who tries to enlarge the productivity of his business enterprise through
transactions not in accordance with the conduct of reasonable business men
introduces circumstances into his business sphere capable of falsifying the basis

\textsuperscript{83} This may give the impression that Callmann was a progenitor of modern economic “game
theory”. Nothing could be further from the truth. The game theory of John von Neumann and his
followers examined the interactions of players in a formalised “game” representative of some aspect of
social life (not necessarily business competition) in which each was conscious that they could prevail (or
survive) not only by the direct effect of their actions, but by exchanging signals of strength or weakness,
aggression or passivity, determination or indifference, all of which could be real or shammed, as the
occasion demanded. For Callmann, the metaphor for competition was not so much that of a game, but
of a race, in which there was no such interaction. See above, fnn. 61 and 62. Poker, the archetypical
game of von Neumann’s theorising, would have horrified Callmann.

\textsuperscript{84} In treating business competition as a “game” with certain rules, Callmann is at one with his
contemporary Frank Knight, “The Ethics of Competition” (1923) 37 Quarterly Journal of Economics 579,
but Knight (who is not cited by Callmann in this context) is much more acutely aware of the limitations
of the metaphor—and with the realisation that it might not be a metaphor, at all.


\textsuperscript{86} Callmann, “Unfair Competition” (1940) 5 Georgetown Law Journal 585, 600. The quotation
continues with Callmann’s definition-cum-description of “constructive effort” which is quoted above at
fn. 2.
of comparison. As in the game, the winner will not be the competitor who wangled an advantage by means which had nothing to do with his ability to run the race.

This line of reasoning leads us to the classification which should be the ‘pole star’ of unfair competition: the distinction between competition embracing constructive effort and competition embracing non-constructive effort. The former will always be allowed; there can be no constructive competition which might be unlawful. The latter should fundamentally be forbidden.”

The field of competitive struggle is of course the market, to the natural order of which the “game-like” rules of competition are necessarily an adjunct rather than a replacement, and a rough definition of lawful competitive conduct might therefore be: “struggle according to game-like rules by means of constructive effort subject to the natural conditions of the market.” Violation of this principle is to some degree a violation of the competitive order itself, which the law ought to remedy: 87

“Competition in business life forms a peculiar order of struggle as distinguished from the order of peace. Within this order the conduct of men is governed by game-like rules which are to be derived from the principle of constructive effort. In displaying their own strength and skill, their own independent exertions, the participants of the competitive struggle are subject to the conditions of the market. Hence we reach the following rough definition of a competitive conduct: struggle according to game-like rules by means of constructive effort subject to the natural conditions of the market.

This definition furnishes three elements of competitive conduct: (1) of struggle, (2) that of game-like rules and among these the element of constructive effort, (3) that of subservience to the conditions of the market. Any violation of one of these three elements constitutes an anti-competitive conduct, but it is of far reaching importance outside the law of unfair competition to realize that not any anti-competitive conduct is necessarily competition unfair against a fellow-competitor.

The struggle (element 1) may be superseded by peace and this is the typical case of a violation of the spirit of the anti-trust laws, e.g., in the form of trade agreements stifling competition, and it seems to be no exaggeration to say that just as the law of the order of peace is violated by struggle so the law of the order of struggle is violated by peace.

Business has to be carried on subject to the conditions of the market (element 3). If the entrepreneur tries to become master of the market he violates the anti-trust laws which are to preserve competition and to prevent monopolies.

In these cases there is not so much an unfairness of competition as a violation of the competitive order as such by contravening or disavowing its very fundamentals.

The tortious conduct which we are wont to call ‘unfair competition’ is that which violates the rules of the ‘game’ competition. As to its legal nature we now may conclude, that it is a real tort in so far as in the law of competition we also follow the old and well-established rule that the infringement of a right or the

violation of a duty are necessary ingredients of this kind of tort. But when we
determine the interest protected by this law as being the interest of the
competitors in having all of them acting in harmony with the rules of
competition, we are not confining ourselves to the establishing of a new interest
within the ordinary law of torts, but are recognizing, as we termed it, a tort *sui
generis*.”

The most serious offences against the competitive order might thus be said to be those which
subverted the very fact of competition. On the one hand this might involve withdrawing from
competition altogether, as with cartels or other forms of collusion. On the other hand, it might
involve acts of competition so unfair or aggressive as actually to suppress competition to a
significant extent. However, as Callmann acknowledged, this still left us with the problem of
defining the rules of the game as they were to apply to less extreme situations.88

“But positively speaking, we have to fill in the conception of the ‘rules of the
game.’ … In D’s case [that of the copied catalogue], however, there is an
antithesis which cannot be solved by the mere feeling of decent people; here we are confronted with a diversity of principles as is shown in the different
opinions of the *Associated Press* case, viz., whether it is legal for a business
man to reap where he has not sown, or whether the practice to appropriate and
use for profit the business values produced by other men is sanctioned by law.
Though it may be that in D’s case the ‘sound feeling’, the ‘judicial sensibility’
may find it easy to plead for D, the problem as such is complicated and
anything but easy. A mere reference to this difficulty shows that the necessity of
filling in the concept of the ‘rules of the game’ presents us with a great task
which must be met if ever the weight of authority is willing to adopt the theory of
the competitive struggle and of the tort *sui generis*. From the game character
of the competitive struggle and from its inherent requirement of constructive
effort, we shall, in the course of further inquiries, obtain a more and more
definite description of the broad interest of the competitor as determined here,
and, herewith a new basis which may be a better standard than the present too-
narrow concept of unfair competition.”

The *Louisiana* article

In the second of these three articles, Callmann dealt with “Copyright and Unfair Competition”,
which he had already touched upon in one of four scenarios considered by the first article. He
began:89

“The artistic or literary qualities of commercial advertising and similar sales
promotion devices, the garb and form of commodities, all demand protection of
the law against piracy and infringement, and within prescribed limits they have
been accorded the shelter of the copyright law. Many such creations, however,
are not susceptible to copyright protection. Perhaps … the conduct of the
defendant falls short of being an infringement of copyright, although he has
usurped the talent, ingenuity and labor of the author. In such situations, the


claimant may be able to prove a palming-off and thus invoke some doctrine of equity designed for the protection of reputation and good will. But if he fails in this, should he be outside the pale of the law’s protection?”

And he immediately went on to discuss the *International News* case\(^90\) again. After quoting approvingly from Justice Pitney, Callmann acknowledged, but disowned, the caution of Judge Learned Hand in *Cheney Bros v Doris Silk*\(^91\). The rest of the article applied the principle of *International News* to four categories of subject matter at the borderline between copyright and unfair competition law: imitation of intangible goods; character imitation; a case on performing rights; and the imitation of advertisements and catalogues. With regard to a dictum from a recent state court decision (in which the plaintiff had actually failed), he concluded:\(^92\)

> “[Such] statements presage a new period in the law of unfair competition in which the appropriation of literary and artistic qualities will give rise to rights which will be protected by the courts on simple principles of fairness and through an insistence that ideas of decency in competition be observed. The present practice of resort to the law of copyright is productive of unnecessary confusion, depends on attenuated doctrine and offers at best a makeshift and fortuitous approach.”

So if Callmann wholeheartedly approved of the extension of the law of unfair competition to cover misappropriation of subject matter such as commercial catalogues and advertisements, it is equally true that he was aghast at the misuse (as he saw it) of copyright law to achieve the same results. One reason for this was that copyright protection was too dependent on fortuitous and irrelevant circumstances, even more so in the United States (with its Constitutional limitations, and its requirements of notice and registration), than in England. But that was not the worst of it. In an earlier passage he had commented:\(^93\)

> “[T]he Copyright Act has come to be misused as the asylum of the injured competitor against the piracy of his rival. This is clearly a perversion of the copyright ideal.”

**The Harvard article**

The second (*Louisiana*) article had in effect argued that much of the philosophy and consequences of “reaping without sowing” should be reallocated from copyright to unfair competition law. The copyright lawyers might have won the race, but when all was said and done the prize did not really belong to them. As its title implies, the third article in the trilogy is

\(^{90}\) (1918) 248 U.S. 215.

\(^{91}\) (1929) 35 F.2d 279.

\(^{92}\) Callmann, “Copyright and Unfair Competition” (1940) 2 *Louisiana Law Review* 648, 668. Citation omitted.

wholly dominated by, and dedicated to, the principle of the International News case.\textsuperscript{94} The first (Georgetown) article had actually ended ambiguously and rather quizzically, with its author admitting that International News pitted two competing values against one another, and that neither could be clearly identified as right merely by reference to a game, whose rules were still to be defined.\textsuperscript{95} Callmann had also promised, in a footnote, to deal in due course with the case of:\textsuperscript{96}

"[T]he competitor ‘who reaps where he has not sown,’ thus adding to the famous ‘palming off’ the element of unjust enrichment as another pillar of wisdom.”

Whether Callmann’s original equivocation over the normative value of International News was real or rhetorical, he sought to answer the question in his best-known and most influential article “He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition.”\textsuperscript{97}

Callmann began with a lament for the Cinderella treatment of unfair competition law, which was the theme on which he had ended the first (Georgetown) article, and in fact the articles read best with number one (Georgetown) leading directly into number three (Harvard), with number two (Louisiana) either as a prelude or a coda, if it is not to be something of a diversion. But to return to the theme of the Harvard article:\textsuperscript{98}

“In a society which has repeatedly dedicated itself to the proposition that its social and economic salvation lies in competition, it remains a perennial source of wonder that the desirable and undesirable aspects of competition have never been precisely defined. It is not unfair to say that our economic system, founded on strenuous competition, is governed by a legal system which ignores that competition’s very existence.

At a relatively early period, relief was granted against competition by means of false trade-marks and trade names. Later, courts came to recognize the desirability of protecting the good will of a business enterprise, its customers’ habit of patronage. But except in isolated instances, the common law has as yet gone no further.

The most important exception occurred twenty-four years ago, when the Supreme Court of the United States handed down its decision in International News Service v Associated Press. This case apparently foreshadowed rapid development by the courts of a new body of equitable principles which would

\textsuperscript{94} (1918) 248 U.S. 215.

\textsuperscript{95} Above, fn. 88.

\textsuperscript{96} Callmann, “Unfair Competition” (1940) 5 Georgetown Law Journal 585, 607 fn. 56.

\textsuperscript{97} (1942) 55 Harvard Law Review 595.

belatedly require business practice to measure up to minimum standards of public morality. The expectation, however, has not been fulfilled.”

After the briefest possible summary of the facts of International News,\(^9\) and a rather more extended quotation from the judgment of Justice Pitney, Callmann went on to say where the innovation of the decision lay:\(^{100}\)

“This case in effect imported into the law of unfair competition the concept of unjust enrichment. Previously, competitive wrongs not falling within the categories of tort or breach of contract were enjoined only if they amounted to ‘passing off’ the defendant’s goods as those of the complainant. Of this, International News Service was guiltless.

That the basis of the decision is to be found in the relation between the parties, rather than in a general property right of the complainant, is demonstrated by the Court’s requirement that the injunction be directed against such appropriation as would clearly constitute a taking of the short-term commercial value news normally has. This approach to the problem is particularly significant, for in essence it is a recognition of the peculiarities of the subject matter dealt with, and an attempt to formulate appropriate rules of law regulating the competitive relationship.

... Although Chief Justice Hughes, writing seventeen years later, considered that the Associated Press decision had expanded the concept of unfair competition to apply to any ‘misappropriation of what equitably belongs to a competitor,’ the courts are still unable to agree how far the Associated Press doctrine may be applied outside of newspaper competition. This may in part be attributed to the persuasiveness of Mr. Justice Brandeis’s criticism; if so, a further development of this phase of the law will await an effective answer to his objections.”

Callmann proposed to answer the scepticism of Justice Brandeis in four stages, first, by showing that the public interest was (at the very least) perfectly consistent with the emergence of a judicially-created tort of unfair competition; secondly, that decided cases from before and after International News provided more than adequate support for the doctrine; thirdly, that the problem was properly one in respect of which the courts, rather than the legislature, should take the initiative; and finally that he recognised the existence, by way of exception, of situations in which appropriation of the ideas or efforts of another was and should remain entirely lawful.

So far as the first is concerned, Callmann was rather more sanguine than Brandeis in the ability of the courts to fashion appropriate remedies, and to take account of mitigating factors and the public interest. But he immediately went on to invoke the public interest in favour of the actual

\(^9\) (1918) 248 U.S. 215.

result in *International News*, while insisting that promoting a socially utile outcome in an individual case was secondary to doing justice between the parties.\textsuperscript{101} 

“Why a court could not choose the appropriate remedy, or take cognizance of certain mitigating factors, is not clear. Nor is it apparent that a court cannot carefully consider the effect of news pirating on the public. Had there been nothing to prevent the International News Service from continuing the action complained of, the Associated Press might eventually have been driven out of business by the competition of a rival whose expenses were so much less. And in that event, since the Associated Press had gathered the news which International was distributing, the public would have been deprived of foreign service. No company could maintain large news-gathering services if it were subject to such competition; news could then be obtained only if competition were destroyed, and something in the nature of a news trust formed. This is a strong case, but I think that it can be said in general that the public will not be benefited by allowing one competitor to profit, from the fruits of another's labor and expense. This may be true in other situations as well, but it is particularly so when one competitor enriches himself at the expense of the other.

Generally the public interest is important only negatively. To justify any regulation of competition, it need not be shown that it is positively advantageous to the public, but only that the public is not harmed thereby.”

Continuing with the public interest point, the law should be based on the proposition that competition was inherently beneficial to the public, provided it was pursued in the right spirit, so there was no need to find a specific public benefit in every case in which the law was expected to intervene. The explicit public interest criterion was really a residual and negative one, to be invoked in the few cases where competition got out of hand.\textsuperscript{102}

“If injury to the public will support neither an action nor a defense, it should hardly be necessary for a plaintiff to show that his recovery will affirmatively benefit the public. The proper ordering of relations between the competitors themselves is sufficient reason to act when the public is not affected either way.

It is not the purpose of this article to lay down a developed law of unfair competition, but only to advocate the extension of that law as it exists today to include a concept of unjust enrichment. It may not be out of place, however, to suggest that when the law develops—as it certainly will, whether by court action or by statute—it should be based on a recognition of the distinction between competition and its absence and on a philosophy which recognizes that competition is beneficial to the public as a whole.

... 

An economic order founded on competition should be characterized by attempts to acquire the customer’s patronage by giving him the opportunity to judge freely the quality, price, and service each offers as his own work. Violations of such a standard, though they may not injure the public, will


generally not benefit it, and justice to the competing individuals requires that such violations be prevented."

I shall pass quickly over the next section, since it is essentially a collection of decided cases, both English and American, which does not readily lend itself to summary. I also have to say that I find it unpersuasive. There are dicta enough here in which one can find the International News principle foreshadowed if one is so minded, but it takes the eye of faith to do so at all consistently. Several of them had been already reviewed in Cheney¹⁰³ and either explained—or explained away—on more conventional grounds. Callmann himself more than half admits that he is really only going through the motions, and I am inclined to agree.¹⁰⁴

“The general doctrine upon which the decision in the Associated Press case was based is not without support in the cases before and since. Much of this support must be found in dictum and dissent rather than holding, and since an unfair-competition case almost invariably presents an extremely complex factual situation, it is inevitable that opinions will frequently differ as to which factors actually control the decision. I think, however, that sufficient agreement can be found to establish that for most courts the way is as yet clear to extend the law of unfair competition to prevent unjust enrichment.”

The next section compared the relative merits of legislation and judicial activism, and concluded that there was no obstacle to the latter.¹⁰⁵ Finally, Callmann acknowledged, in rather cursory terms, that there were creations of value which were altogether too intangible to be protected at all.¹⁰⁶ On the whole though, he was dismissive of this problem. The fundamental point so far as he was concerned was that it was only the commercial appropriation of ideas or innovations by a competitor that was proposed to be actionable in the first place, and the limitations inherent in this meant that further public interest exceptions were unlikely to be needed. Scholarship and pure science occupied worlds of their own, and their members had nothing to worry about.

Callmann and his cultural values

In their obsession with incessant striving the three law review articles may be said to embody not only Callmann’s personal views, but the purest distillation of a certain kind of German thinking, and not merely German legal thought. This may seem surprising, when competitive sport is widely believed to have been an English invention, and “playing the game according to

¹⁰³ Cheney Bros v Doris Silk Corporation (1929) 35 F.2d 279.
the rules” is supposed to be an English (rather than a German) obsession, and a self-defeating one at that.\textsuperscript{107} But although Callmann may have refashioned his metaphors from their Homeric originals to suit a twentieth Century American readership brought up on the Protestant work ethic,\textsuperscript{108} and the “Strenuous Life” of a former President,\textsuperscript{109} the underlying sentiment is pure \textit{Sturm und Drang} romanticism, and all that talk of striving is straight from Goethe’s \textit{Faust}:\textsuperscript{110}

\begin{quote}
Was willst du armer Teufel geben?
Ward eines Menschen Geist, in seinem hohen Streben,
Von deinesgleichen je gefaßt?
Doch hast du Speise, die nicht sättigt, hast
Du rotes Gold, das ohne Rast,
Quecksilber gleich, dir in der Hand zerrinnt,
Ein Spiel, bei dem man nie gewinnt,
Ein Mädchen, das an meiner Brust
Mit Äugeln schon dem Nachbar sich verbindet,
Der Ehre schöne Götterlust,
Die, wie ein Meteor, verschwindet?
Zeig mir die Frucht, die fault, eh man sie bricht,
Und Bäume, die sich täglich neu begrünen!
\end{quote}

In the quiet of his study, Callmann himself is obviously in thrall to this Faustian obsession with perpetual striving for its own sake, and in the \textit{Harvard} article, he even introduces his conclusions by quoting Goethe:\textsuperscript{111}

“The thesis I have tried to present is that one who has used his intellectual, physical, or financial powers to create a commercial product should be afforded judicial relief from a competitor who seeks to ‘reap what he has not sown’. Goethe once said:

\begin{quote}
“Canst thou, poor Devil, give me whatsoever? | When was a human soul, in its supreme endeavor, | E’er understood by such as thou? | Yet, hast thou food which never satiates, now,— | The restless, ruddy gold hast thou, | That runs, quicksilver-like, one’s fingers through,— | A game whose winnings no man ever knew,— | A maid that, even from my breast, | Beckons my neighbor with her wanton glances, | And Honor’s godlike zest, | The meteor that a moment dances,— | Show me the fruits that, ere they’re gathered, rot, | And trees that daily with new leafage clothe them!”
\end{quote}

\textsuperscript{107} In the field of business competition, it is intriguing that the motto or slogan of \textit{Wettbewerbszentrale} (the \textit{Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V.}) should be “Fairness im Wettbewerb”: www.wettbewerbszentrale.de/de/home/.


\textsuperscript{109} Theodore Roosevelt, then Governor of New York but with higher ambitions, delivered his speech, \textit{The Strenuous Life}, to an audience at the Hamilton Club in Chicago on April 10, 1899. The \textit{New York Times}, April 11, 1899, p. 3.

\textsuperscript{110} Johann Wolfgang von Goethe \textit{Faust} (1808-1832) Part I, Scene IV, \textit{Studierzimmer (II)}, lines 1675-1687; English translation by Bayard Taylor (Boston: Mifflin and company, 1871): “Canst thou, poor Devil, give me whatsoever? | When was a human soul, in its supreme endeavor, | E’er understood by such as thou? | Yet, hast thou food which never satiates, now,— | The restless, ruddy gold hast thou, | That runs, quicksilver-like, one’s fingers through,— | A game whose winnings no man ever knew,— | A maid that, even from my breast, | Beckons my neighbor with her wanton glances, | And Honor’s godlike zest, | The meteor that a moment dances,— | Show me the fruits that, ere they’re gathered, rot, | And trees that daily with new leafage clothe them!”

‘People are always talking about originality; but what do they mean? As soon as we are born, the world begins to work upon us, and keeps on us to the end. What can we call ours, except energy, will, strength?’"

Callmann then jumped the centuries to quote John Maynard Keynes, for his observation that:

“Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.”

But at this point we may need to remind ourselves that although Faust’s ceaseless striving may ultimately have saved his soul from damnation, he left a trail of dead babies and desolate maidens behind him, or “negative externalities”, as the economists say. Besides, we have it on no less than Divine authority that all that striving was no guarantee of inerrancy: “Es irrt der Mensch so lang er strebt.”

The treatment of copyright in the *Louisiana* article is again an example of German legal thought at its most idealistic. In Callmann’s view, the proper role of copyright was to protect the intangible expressions of that mysterious and untranslatable human essence called Geist. True enough that Geist sometimes manifested itself in works less exalted than those of Savigny or Goethe, for example, but by no stretch of the imagination was so much as a glimmer of Geist to be found in the likes of the celebrated annual illustrated catalogue of Messrs Sears-Roebuck of Chicago, to which every mid-western farmer extended a grateful hand at the close of his ablutions, in imperfect and unconscious imitation of Lord Chesterfield’s advice to his son.

Long before Callmann, Anglo-American law had taken the opposite direction, asking only if the alleged copyright work fell into one of the statutory categories, which were broadly construed; whether there was sufficient originality, for which perspiration was as good an indicator as inspiration; and whether the defendant had copied. For Rudolf Callmann, this was not only heresy, it was an affront to human dignity. Copyright had to be rescued from the nail in the outhouse, and returned to its proper place on the shelves of a gentleman’s library—just

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113 Johann Wolfgang von Goethe, *Faust* Part I (1808, revised 1828), *Prolog im Himmel*, line 317, per Der Herr. “Man errs, till strife is ended.”


as unfair competition law had to be released from the constraints imposed on it by the timorous and narrow-minded, and restored to the undisputed possession of its full inheritance.

Though Callmann’s theories are thoroughly imbued with the Geist of the great Dichter and Denker of the German Enlightenment, is it really to them that one should look for guidance on a subject as seemingly unromantic as the law of unfair competition; or should it rather be to practitioners of the dismal science, like Keynes himself, and the whole line of defunct and unidentified economists stretching out beyond him? And has Callmann even read his Goethe correctly? The passage which reads “What can we call ours, except energy, will, strength?” pointedly excludes conventional worldly possessions such as property, money and social status; not to mention popular esteem, a successful career, and critical acclaim—all of which Goethe enjoyed in abundance, but precisely the things Callmann was forced to leave behind him in Europe—and seems to imply that though the energy, the will and the strength may be inalienably ours, the fruits of our efforts may not be ours at all, and we should not be too downhearted if that turns out to be the case. In fact, this passage from Goethe states clearly enough that what we naively think of as our own original creations are really the joint productions of ourselves, our environment, and our ancestors. And where in Goethe will one find any such glorification of money, most transient and elusive of all these so-called values—“Du rotes Gold, das ohne Rast, Quecksilber gleich, dir in der Hand zerrinnt?”—let alone man’s “financial powers”, whatever they may be? The only gold worth having, though it is Mephistopheles who says so, comes from the tree of life. But move a century forward to Max Weber and his Protestant Ethic and the Spirit of Capitalism, and one must concede that by equating human striving with shrewd investment, Rudolf Callmann had struck precisely the right note for his American readership.

116 Above, at fn. 112.
118 Above, fn. 110.
120 Weber, Protestant Ethic, 1905. (Note Weber’s deliberately provocative use of Geist in the original German title).
Callmann’s later thoughts

Round up of the articles: where Callmann stood in 1942

In all three articles, Callmann had quite rightly emphasised that the International News case was an entirely fresh departure for Anglo-American common law. On the other hand, and in the Harvard article in particular, he did attempt to assemble a number of earlier authorities to support the decision, and a few later ones as applications of it, though to my mind he failed to do so convincingly. A proposition as fundamental and wide-ranging as Callmann would have us extract from International News needs to be justified on a suitably grand scale, or the effort is worthless, and this cannot be done from the miscellany of dissents and dicta which, even on his own admission, is almost all he is able to offer us. Conversely, a tent as big as that which Callmann erected for International News is bound to contain quite a few previously decided cases, at least in retrospect, and quite a lot of rubbish. What is perhaps surprising is that the tent was so sparsely populated, and that by no stretch of the imagination could it be said that a doctrine as all-embracing as Callmann would have us accept was remotely necessary to shelter them all. Was Callmann really looking for the simplest possible framework on which all the multifarious antecedent material could hang; or was he trying to see how ambitious a structure the single decision in International News would support?

Callmann’s Law of Unfair Competition and Trade-Marks

In the first edition of his American textbook, Callmann reiterated the central importance of International News, and the Leistungsprinzip which (to his way of thinking) was already embodied in it:

“The principle of the Associated Press case is merely a colourful restatement and application of the rule that every competing businessman must make use of his own effort and skill.”

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122 (1918) 248 U.S. 215.


125 Callmann, Unfair Competition and Trade-Marks, 1945.

126 Callmann, Unfair Competition and Trade-Marks, 1945, §8.3, p. 117. (Section numbers are given as well as page numbers because the former are easier to follow between editions).
More pessimistically, however, he had to acknowledge:\(^\text{127}\)

“The courts have persistently refused to follow *International News Service v Associated Press*, which may rightly be called the landmark in the law of unfair competition.”

And he went on to cite some short passages from the judgment of Justice Pitney. But Callmann realised that words alone were not enough, either to define the concept, or to justify the law’s intervention:\(^\text{128}\)

“A recognition that the meaning of the term ‘unfair competition,’ in a technical sense, should be equivalent to the meaning ascribed to it in common parlance will neither clarify its meaning as a legal term nor allow its use as a legal standard. Nor does clarification result from embellishing the term with statements that unfair competition ‘consists of selling goods by means that shock judicial sensibilities’; or that the law of unfair competition is ‘but a reaffirmation of the rule of fair play. It aims to effect honesty among competitors by outlawing all attempts to trade on another’s reputation—it gives the crop to the sower and not to the trespasser’; or that ‘fair competition is “open,” “equitable,” “just” competition.’ It serves no useful purpose to evade the task of clarification by positing a ‘more liberal’ or ‘modern’ concept of unfair competition and holding that there may be unfair competition, even absent actual or potential competition.”

In Chapter 15, dealing specifically with misappropriation of a competitor’s values, Callmann acknowledged much more clearly than before that the arguments of his *Harvard article*\(^\text{129}\) were by no means open and shut:\(^\text{130}\)

“For many decades, the aphorism ‘he who reaps where he has not sown’ had been invoked in English and American decisions. Persuasive and appealing though it sounds, its very piquancy warns of the need for thorough examination. When the jurist becomes too impassioned, and his rhetoric too colorful, he may be easy prey for elliptical logic.

The justification for the following assumptions must be determined:

1. That he who reaps where he has not sown is legally responsible as an unfair competitor, thus giving legal essence to an otherwise meaningless figure of speech;
2. That undercutting this biblical quotation there is a precise concept more legal than poetic;
3. That this maxim recognizes another cause of action, equally as valid as that which is based upon the doctrine of passing off.


\(^\text{130}\) Callmann, *Unfair Competition and Trade-Marks*, 1945, §60.3, p. 728.
The significance of the Associated Press case and its contribution to the law of unfair competition are readily apparent. It recognizes a cause of action different from those which are founded upon the traditional requisites of the law of torts and the doctrine of ‘passing off’. This cause of action is figuratively designated by the phrase ‘he who reaps where he has not sown.’ And it also sponsors the principle of unjust enrichment which had never before been attached to the law of unfair competition.”

However, one does not need to be particularly dogmatic to take exception to the footnote which terminated and explained the foregoing passage:

“‘Unjust enrichment’ as used here, is a concept different to that which is part of the law of quasi-contracts. It does not refer to an action for restitution, but to an independent concept of substantive law; a particular tort in the law of unfair competition.”

So at this point in its development Callmann’s action for unfair competition is neither fish, flesh, nor fowl, as we had previously understood any of them, nor even a good old-fashioned red herring. Like the Bavarian Wolpertinger it takes on some of the characteristics of each, according to the workings of one’s imagination. Unfair competition is sometimes described as “Protean” after Proteus, the Old Man of the Sea, who could change his shape at will, and if this is not a suitably “Protean” legal doctrine to match, then what is?

**The importance of competition**

However, Callmann had another argument in addition to what has been stated so far. This depended on the underlying proposition that when parties were in economic competition, and only then, then there was little or no difference between unfairly strengthening oneself, and unfairly weakening one’s opponent. In the competitive struggle it was the balance of advantage which counted, and in either event, the odds were unfairly changed in favour of the party who was violating the rules of the game. In a case of perfect symmetry, in modern terms a “zero-sum game”, the benefit to the misappropriator might be matched by a precisely corresponding detriment to the victim, but this was by no means the only possible analysis. In cases of pure unjust enrichment the misappropriator might gain something, while the “victim” might lose nothing in absolute terms, but only in comparison; while in cases of malicious damage the victim might suffer enormously while the aggressor benefited little, or not at all. In all three cases, what mattered, according to Callmann, was that the balance was tilted against the fair and honest competitor who relied solely on his own constructive efforts, and towards his antagonist: the parasite, the vandal, or the thief.

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132 A fictitious or mythical animal, never seen alive. Stuffed wolpertingers combine body parts from various incompatible animal species as a demonstration of the taxidermist’s skill and sense of humour.
In his textbook, Callmann returned to his concept of competition as a game subject to rules, and put his case this way:\footnote{133}{Callmann, \textit{Unfair Competition and Trade-Marks}, 1945, Chapter 15, introduction (unnumbered, precedes §60), pp. 722-23. The theoretical machinery of the \textit{Georgetown} article is also reproduced in Chapter 2, “The Theory of Unfair Competition” §§6.2(a) to (l); pages 89-104.}

“The misappropriation of another’s values in the competitive struggle is tantamount to depriving the competitor of his competitive equipment and using it to his injury. … Misappropriation need not involve a taking with trover and conversion as the legal consequences; it covers also a contemporaneous use of any value which can be used by several persons, though the rightful owner may be ignorant of the use and though damage does not immediately follow. … But, however intangible the equipment for the ‘game’ competition, it would be a flagrant violation of the rules for one player to deprive the other of his outfit and defeat him with his own weapon. From the postulate that, in competition, every participant must exercise ‘constructive effort’, i.e. his own strength and skill, it logically follows that no one is entitled to ‘reap where he has not sown.’”

So on Callmann’s view it was probably sufficient for liability in tort to say that International News gained an unfair competitive advantage relative to Associated Press by copying the bulletins of the latter, and liability was presumably complete at that point. He could, at least in principle, have stopped there and then without any further enquiry as to whether Associated Press was actually damaged by the supposed misappropriation.

\section*{The later editions}

In later editions, Callmann took his ideas a degree further, and made the parallelism between gain and detriment more explicit:\footnote{134}{Rudolf Callmann, \textit{The Law of Unfair Competition, Trademarks, and Monopolies}, §60.3 in the 4th ed (1981). I have not been able to confirm that the same passage appears in the 3rd ed. (1967).}

“Thus, it recognized that a competitor may properly be enjoined from doing what a noncompetitor (e.g. a member of the newspaper reading public) may be permitted to do. Moreover, the majority opinion recognizes two new causes of action which differ markedly from those founded upon the traditional requisites of the law of torts and the ubiquitous doctrine of ‘passing off’—i.e., causes of action based upon the misappropriation and the exploitation of a competitor’s business values.

The misappropriation aspect focuses upon the harm done to the plaintiff, while the exploitation aspect focuses upon the benefit gained by the defendant, i.e. unjust enrichment. It is important to note that both aspects are present only when the plaintiff and defendant are, at least in some sense, competitors; because then the business gained by the defendant can be viewed as potential business taken away from the plaintiff. The INS case itself is an example of this kind of situation. But when the parties are not to any extent competitive, then only the unjust enrichment aspect is present. This must be kept in mind when considering the question of whether the INS doctrine should apply to noncompetitive cases.
In every misappropriation or exploitation case, the defendant is cast in the role of ‘one who reaps where he has not sown.’ And these cases also express the law’s basic antipathy toward unjust enrichment, a principle that had never before enjoyed such status in the law of unfair competition.”

So does this mean that there were in effect two coexistent causes of action, arising out of the same facts, and both going under the name of “unfair competition”, but with one of them being essentially tortious (despite its label of misappropriation), and the other essentially restitutionary? Or was there one single cause of action, which had both tortious and restitutionary aspects, and which could not wholly be understood in terms of either alone? One is reminded of the story of the Dean’s Labrador dog.135

“Among the sillier Oxford stories is that of the Dean’s dog. The college’s rules forbid the keeping of dogs. The Dean keeps a dog. Reflecting on the action to be taken, the governing body of the college decides that the Labrador is a cat and moves to next business. That dog is a constructive cat. Deemed, quasi- or fictitious, it is not what it seems. When the law behaves like this you know it is in trouble, its intellect either genuinely defeated or deliberately indulging in some benevolent dishonesty.”

But at least the Dean’s dog (or cat) was either one thing or the other, unlike Schrödinger’s cat,136 which was neither alive nor dead, but in some undefined intermediate state, to the bewilderment of itself (if alive), or its ghost (if dead), and an entire generation of scientists. In the same vein there was the dilemma of the generation of physicists immediately preceding Schrödinger’s, uncertain whether light was a particle or a wave:137

“It was intolerable that light should be two such contradictory things. It was against all the ideals and traditions of science to harbor such an unresolved dualism gnawing at its vital parts. Yet the evidence on either side could not be denied …. It is well that the reader should appreciate through personal experience the agony of the physicists of the period. They could but make the best of it, and went around with woebegone faces sadly complaining that on Mondays, Wednesdays, and Fridays they must look on light as a wave; on Tuesdays, Thursdays, and Saturdays, as a particle. On Sundays they simply prayed.”

The source of the rules of the game

Callmann had one more point to deal with as a matter of general principle, which is that if he was to be at all consistent in postulating the existence and relevance of separate but parallel worlds, one for everyday social life, and one for economic competition, then he must have

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135 Birks, Restitution, 1985, at p. 22.


recognised that a rule cannot become established in the world of competition and struggle, simply by virtue of its reflecting moral platitudes which were accepted in the social world of tranquil coexistence. On the contrary, any rule which seemed to be founded in conventional social morality, rather than being justified by the special calculus of economic competition, needed to be scrutinised with particular care, and even scepticism, in case its instinctive appeal was to our soft social hearts, rather than our hard economic heads. In his Georgetown article Callmann had already said as much:

“The writer suggests to supersede the phrase ‘unfair competition’ by the phrase ‘illegal competition’, because the former has ‘emotional and ethical implications peculiarly subject to the economic bias of the person using the term.’ ... Still more should concepts such as ‘cut-throat competition’, ‘unethical trade practices’, and similar unfavorable and obnoxious phrases be avoided in legal considerations.”

Religious-sounding platitudes such as that against “reaping without sowing” are subject to a twofold objection in this respect: first, that their original purpose was not to provide appropriate rules for the “game” of economic competition, but to foster Christian (or Jewish) moral values in ordinary social life. Secondly, that in what was still a predominantly religious day and age the supposed Biblical provenance of the saying might have given it a spurious (and, dare one say, unfair) advantage in the competitive market of ideas.

Callmann’s reply to Justice Brandeis

Finally, the objections of Justice Brandeis needed to be addressed. In one respect, of course, Brandeis and Callmann were at irreconcilable extremes of opinion: Brandeis (not previously noted for judicial conservatism or lack of self-confidence) had refused to intervene where the legislature had feared to tread, whereas Callmann wholeheartedly endorsed Justice Pitney’s equally uncharacteristic venture into judicial activism. Justice Brandeis, it may be remembered, had argued thus in INS: 248 U.S. 215, 250.

“An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the

138 In fact, Callmann favoured keeping law and morality in separate mental compartments. See Callmann, Unfair Competition and Trade-Marks, 1945, §7.1, p. 104 et seq.


140 248 U.S. 215, 250.
noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.”

And more briefly:141

“To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but, with the exceptions indicated above, the law has heretofore sanctioned the practice.”

However, the exceptions which Justice Brandeis had expressly conceded included “unfair competition”, as well as patents and copyright, and this gave Callmann his way in. Somewhat surprisingly, perhaps, Callmann’s gambit was to out-bid Brandeis in his appreciation of the importance of the public domain. In a section entitled “Lawful Appropriation as an Exception” he wrote:142

“We might content ourselves with this statement, for even Mr. Justice Brandeis expressly excepts unfair competition. But since the concept of unfair competition itself is not yet beyond dispute, and since Mr. Justice Brandeis excluded the Associated Press case from the exceptions even though there was admittedly competition, we must probe the social and legal foundations of our economic life to justify the postulate that, at least in the field of competitive struggle, a reaping of another’s harvest is illegal. These questions of policy will take on more clarity as we examine the conditions under which the law expressly sanctions that which would otherwise be a case of unjust enrichment.

In terms of evolution, it can hardly be denied that all members of civilized society do ‘reap where they have not sown.’ Unlike Pallas Athene, new patterns of thought and understanding do not come into being fully conceived. As a rule, it is a fundamental law of human progress that experience and wisdom of each generation is the heritage of the next, and from this cultural milieu, creative achievement can never be divorced. Indeed, progress is measured by the improvements or refinements on existing values. There is, in this respect, no doubt about the figurative validity of the maxim ‘there’s nothing new under the sun.’”

From this point of view Callmann’s disagreement with Justice Brandeis was (perhaps over-optimistically) reduced to one of degree rather than kind: Brandeis had expressly conceded that redress against unfair competition was a valid reason for recognising private rights in respect of what would otherwise be public property. Callmann’s concern was to demonstrate that the law of unfair competition—previously thought to be confined to situations of passing off—had a

141 248 U.S. 215, 257.
142 Callmann, Unfair Competition and Trade-Marks, 1945, §62, pp. 748-49. See also at fn. 251 below, where this quotation is continued and concluded.
valid rationale which gave it a much greater scope, and justified much more extensive inroads into what would otherwise be the public domain.

**Callmann’s analysis reconsidered**

**Property, tort, or unjust enrichment?**

To some extent, Callmann may have succeeded in transforming what may have been an example of unjust enrichment by (mis)appropriation into a tort of unfair competition properly so-called, but with several unstated qualifications. First, the argument is circular, at least as regards the copying of information which was already in the public domain for copyright purposes. No business has any kind of legal or equitable right to the quiet and uncontested enjoyment of what is not its own, still less an exclusive right to what is really the common property of everyone. Unlike the other two practices enjoined in *International News*, the copying of published news items was not inherently wrongful. As in numerous other instances, competitive conduct in business may be highly damaging, in a purely economic sense, without being injurious in law.

This leads to another dubiously satisfactory aspect of Callmann’s treatment of *International News*, which is his willingness to categorise the cause of action as one for unfair competition, while being reluctant to admit that the practical consequences of what he proposed were barely distinguishable from elevating the action for unfair competition into one for interference with property rights properly so called, and treating news and other “valuable intangibles” as property. Although Callmann disclaimed any intention to create a new property right, his professed self-restraint was hardly borne out by the end result.

To rebut the argument that the *International News* decision had given plaintiffs altogether more than anyone had bargained for, Callmann argued that the very nature of property meant that the rights it conferred were good against the whole world, whereas the Supreme Court had made it clear that *International News* were liable only because they were competitors of Associated Press, and that the public at large were unaffected. Members of the public could do what they liked with the news as soon as it was published, but competitors of Associated Press had to wait their turn. This is certainly a valid distinction in principle, and in other circumstances it might be a conclusive one. But the common law is more pragmatic, and the dividing lines between proprietary and non-proprietary rights are less than clear cut. In the

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143 *Christopher Wadlow* (1918) 248 U.S. 215.

present case, were the rights of Associated Press really so very different from those arising from a trade mark, or a patent, both of which are undoubtedly proprietary, but which are incapable, at least in some legal systems, of being asserted against mere private citizens?

Callmann’s *riposte* to the argument that there was no real distinction between trade mark protection and unfair competition was entirely characteristic of him.145 It was to acknowledge the factual distinction, but to insist that trade marks were indeed property, and to argue that the rights associated with trade marks in American legal practice at the time were unduly limited by the courts failing to give full effect to their proprietary nature, and confusing them with rights sounding in unfair competition, with all the restrictions that entailed. Hence (among other reasons) his enthusiastic support for the doctrine of trade mark dilution.146

**International News as misappropriation of a competitor’s business organisation**

Callmann did not quite end here, but also invoked another concept derived from German unfair competition law, namely that of *Behinderungswettbewerb*, or simply *Behinderung*, which in one of its numerous aspects could include disruption (or misappropriation) of a competitor’s business organisation, or its means of access to the market.147 While this form of unfair competition was more familiar in the form of directly aggressive tactics such as boycotts, etc., it was not confined to such situations:148

“The subject of protection in the Associated Press case was only the indirect means of realizing an undeserved profit. The Supreme Court explains that it was not the news, as such, which was appropriated by the defendant, but the plaintiff’s business organization, and that the plaintiff could not maintain its news service without that organization.”

This contains, I think, the single most profound observation that has yet been made in support of *International News*149 and its misappropriation doctrine; but it is remarkably easy to overlook, and the point is newly taken in relation to the three law review articles. We are so

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146 See below, at fn. 208.

147 See Piper-Ohly, *UWG Kommentar* (above, fn. 72), §4.10 at 421.

148 Callmann, *Unfair Competition and Trade-Marks*, 1945, § 60.3, page 730. Callmann also devotes part of Chapter 15 (“Misappropriation of a Competitor’s Values”) to a section on “Intrusion into an Established Business System” (§61.3, pages 741-44), but the link to *International News* is not made explicit.

149 (1918) 248 U.S. 215.
fixated with the proposition that International News somehow stands for “property in news” or “property in valuable intangibles” that we all too easily overlook Callmann’s alternative. His transformation of the accepted dogma involves looking, not at the news per se, but at the organisation which the plaintiffs dedicated to gathering and disseminating it. On Callmann’s analysis, the benefit of Associated Press’ European news-gathering organisation was not only misappropriated by International News, but turned against its rightful owner. We might carry the process of abstraction even further, and look not so much at the physical organisation as such, but at its abstract value as a gatherer and disseminator of news: in other words at the goodwill, using that term to embrace goodwill vis-à-vis suppliers (of news) as well as customers.

In the current (online) edition of Callmann’s American treatise there is a footnote reading:

“Here again, Mr. Justice Brandeis fails to grasp the genius of the INS decision. That decision does not create a new property interest in the misappropriated subject matter. It was not the news itself which was protected by the law of misappropriation (although the effect of the court’s decree on the defendant may be similar), but the integrity of plaintiff’s business organization.”

There are really two separate points here: misappropriation of the business system or organisation, as opposed to misappropriation of “hot news” as such; and the prospect of irreparable damage to that organisation. It is the second aspect which has dominated later cases, though it is the first point which Callmann would probably have regarded as the more fundamental. However, though the thought is authentically Callmann’s, the tone is not, and the specific targeting of Justice Brandeis in a series of footnotes seems to overstep the former’s self-imposed boundary between disagreeing with Justice Brandeis, and arguing against him. In any event, Brandeis and Callmann would seem to be in pari materia, since Callmann never seems to have made the point quite so clearly in his life time, as did his editor.

**The risk of destruction of the plaintiff’s organisation or market**

From an objective point of view, this mixed approach based on the concepts of *Ausbeutung* (misappropriation) and *Behinderung* (akin to malicious interference) might have had the further
advantage of providing a single theoretical category which encompassed all three of the practices about which Associated Press originally complained, and not just the copying of news from published sources. The element of disruption was perhaps easiest to identify in so far as Hearst's New York American had broken the terms of its own membership of Associated Press for the benefit of International News, or in so far as International News had bribed a telegraph operator in Cleveland to betray his trust, but to Callmann's way of thinking the very act of copying Associated Press's bulletins without paying was a potentially fatal blow to the existence of Associated Press itself. Callmann invites us to ask: why buy the genuine product from the legitimate source, when stolen goods are cheaper, and buying them from International News is perfectly free of risk? But then why pay International News over the odds for stolen goods, when it would be safe as well as easy to cut out the middle man, and steal them yourself? This is one of many paradoxes of International News, that at the end of the day Hearst probably benefitted infinitely more by losing on the issue of legal principle, than he would have done by winning.

Viewed from this point of view it may have been of secondary importance to Callmann whether International News were unjustly enriching themselves or not: what mattered rather more was that they were setting a bad example. They were acting in a way which was objectively unfair and uncompetitive, and that had the potential—especially if it became widespread—to disrupt and damage the internal organisation of Associated Press in such a way, or to such an extent, that its very existence might have been jeopardised.

One of the many ironies in the history of International News is that a similar chain of reasoning has been invoked, in particular by the Second Circuit, to disregard the misappropriation doctrine as it is widely understood, and to bind its practical application to facts so narrowly circumscribed that they are only likely to occur at intervals measured in decades. Already, in the 1960s, James Rahl had proposed an explanation for the record of rather intermittent success with which had greeted the INS doctrine, in quite similar terms: "A rationale is available. Most of the cases in which relief has been granted have involved certain types of services of a fragile character, rather than products, whose commercial exploitation without destruction by immediate

153 Copying published news sources was only the third of the three complaints of Associated Press, though it was the only one which involved any new law. Callmann himself does not appear to have pursued this point. Indeed, he never shows any interest in the actual facts of International News.


imitation is difficult. The situation has usually been that the defendant, by copying or imitating the service, was not merely competing, but was doing so under circumstances where the result would be to destroy either the value created by plaintiff or the market for it. The protection granted has been to safeguard the plaintiff's opportunity to market his trade value. On this rationale, most of the decisions are acceptable, and perform a valid function.”

Taking his analysis one step further, Rahl proposed:

“There are two key elements in this formula: (1) frustration or destruction, and (2) frustration or destruction of a primary means whereby plaintiff seeks to reap the profit for his labors. The first element must be taken rather literally in order to distinguish from the great mass of ‘appropriation’ situations. It is rare that competitive copying or imitation of a trader’s product or service will substantially destroy his opportunity to market the trade value. What usually happens is a mere ordinary consequence of competition, i.e., a forced sharing of the market with competitors.”

The current dogma of the Second Circuit, as pronounced in National Basketball Association v Motorola, perfectly embodies this line of thought; but note how far NBA is from Callmann. In NBA the court dismissed the misappropriation claim, and in doing so defined the residual application of the “hot news” doctrine in the following terms:

“[T]he surviving ‘hot-news’ INS-like claim is limited to cases where: (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free-riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiff; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service in question that its existence or quality would be substantially threatened.”

So NBA v Motorola applies five cumulative criteria, of which fatal disruption to the plaintiff’s business model is the fifth and final. Callmann, on the other hand, would almost certainly have continued to invoke the International News doctrine to protect all kinds of valuable intangibles created by the expenditure of effort or money (broader than NBA head (i)), against misappropriation or “free-riding” (iii) by a competitor (iv); but he would not have confined it to time-sensitive information such as news (ii). As for the fifth head itself, appearances of agreement may deceive. It is reasonably clear from NBA that the Second Circuit requires this otherwise rather remote eventuality to be proved as a matter of imminent danger if relief is to be granted, whereas Callmann is open to the accusation that he is too easily satisfied by self-

158 National Basketball Association v Motorola, Inc 105 F.3d 841. It must be acknowledged that in the majority of states or circuits the misappropriation doctrine is not confined to the protection of “hot news”.
159 National Basketball Association v Motorola, Inc 105 F.3d 841, 845.
serving *a priori* arguments, or even that he is using an improbably remote danger as a pretext for intervention in every case.

**International News and “the market of ideas”**

A final argument might be that confining Associated Press to purely monetary remedies, in the face of acts of unfair competition repeated day in and day out, would have been the equivalent of giving International News the benefit of a compulsory licence, and exposing Associated Press to repeated unfair acts of competition in perpetuity. Here again, part of the problem is the difficulty of pursuing an analysis ostensibly based on misappropriation and unjust enrichment, in a field dominated by concepts more appropriate to property or tort. Clearly there would have been no point in ordering International News to make actual restitution of the news they had taken and published, as they might have done with stolen trade secrets which remained unpublished, but they might still have made financial restitution based on the value of the news to themselves and their subscribers, or as a contribution to the costs incurred by Associated Press in obtaining it.

However, in the International News case itself there is a further factor which Callmann ought to have drawn attention to, but did not. I have already mentioned that a decision of the United States Supreme Court in 1945 convicted Associated Press of restrictive practices which dated back to the turn of the century, and effectively ordered it to open up access to its news. In October 1916 America had been poised on the brink of war, there was a presidential election which had become a referendum on continuing neutrality, and the American public needed accurate, varied, and up-to-date news of the situation in Europe as never before. Imagine now the kind of arguments which might have been put on behalf of International News, as they were in fact stated or foreshadowed in the judgment of Justice Brandeis:

“The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, ‘a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public’ was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on

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161 (1918) 248 U.S. 215, 263.
its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure temporarily by arrangement with the Associated Press the latter’s foreign news service. For aught that appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto. It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the United States not served by the Associated Press; and a large part of their readers may also be so located that they cannot procure prompt access to papers served by the Associated Press.”

So the argument ran, and though it may sound rather extravagant for Hearst of all people to espouse the causes of editorial independence and journalistic integrity, everything Justice Brandeis had to say had a sound basis in fact. If it all sounds unduly tentative, that is at least partly because these issues were never adequately addressed in evidence on what was an application for an interlocutory injunction, originally argued over one day, in which questions of far less importance predominated.162 By 1918 the facts had also changed enormously. America had entered the War in April 1917, and the Allies had eventually revoked their ban on International News. The Supreme Court did not deliver judgment in International News until after the armistice came into effect, though the United States was still formally at war.

It was only after the appeal in International News, which was followed by a string of appeals from prosecutions under the repressive Espionage and Sedition acts,163 that the values of the First Amendment gradually began to impress themselves on a few of the more open-minded members of the Supreme Court. It was in Abrams v United States that Justice Holmes (with whom Justice Brandeis concurred) equated the search for truth with the competition of ideas as in a market: “the best test of truth is the power of the thought to get itself accepted in the competition of the market”164, thus forging a link from the other side between the two apparently disparate fields of freedom of expression, and regulation of economic competition.

162 Such as whether Melville Stone (of Associated Press) had a conviction for wire fraud (he didn’t, it was a case of mistaken identity); and whether the crooked telegraph operator in Cleveland had also sometimes accepted bribes from Associated Press (he had, but not so often that it counted against them).


164 (1919) 250 U.S. 616 at 630.
Rudolf Callmann and the misappropriation doctrine

To return to the case in hand, only Justice Brandeis, among the judges at any level, seems to have thought through the consequences of intervention, in the sense of attaching any significance to the fact that International News had been excluded from the theatre of war in Europe, for good reasons or bad, and that if they did not get their European news from Associated Press—by fair means or foul—then they, their subscribers, and a significant part of the reading public, might not have got the European news at all.

Two and a half decades after International News, America was once again at war with Germany. This time it was the Associated Press which was under attack in the courts, for withholding its news from competitors of its existing members. Judge Augustus N. Hand, who had granted the first instance injunction against International News in 1917, joined with his cousin Judge Learned Hand\(^{165}\) to deliver judgment against Associated Press:\(^{166}\)

> “[The newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all. ... For these reasons it is impossible to treat two news services as interchangeable, and to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have; it is only by cross-lights from varying directions that full illumination can be secured.”

To conclude this part with an aspect of Callmann’s own theory of unfair competition, the kind of misappropriation for which International News was liable in 1916 was relevant, if at all, only to the last of Callmann’s three rules of competitive conduct: no collusion, no monopolisation, and no unfair play. Recall the passage from the \textit{Georgetown} article which began:\(^{167}\) “Competition in business life forms a peculiar order of struggle as distinguished from the order of peace ...” which argued that a violation of the antitrust laws was not merely an act of unfair competition but something much worse: “a violation of the competitive order as such by contravening or disavowing its very fundamentals”. So if Associated Press were indeed “the

\(^{165}\) Of \textit{Cheney Bros v Doris Silk Corporation} (1929) 35 F.2d 279.

\(^{166}\) \textit{United States v Associated Press} (1943) 52 F.Supp. 362 (a specially-convened three-judge court). The findings of this court (from which Judge Swan dissented) were upheld by a majority in the Supreme Court, \textit{Associated Press v United States} (1945) 326 U.S. 1, with Justice Black commenting that the assumption on which the First Amendment rested was that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”. See Margaret A. Blanchard, “The Associated Press Antitrust Suit: A Philosophical Clash over Ownership of First Amendment Rights” (1987) 61 \textit{Business History Review} 43.

\(^{167}\) Callmann, “Unfair Competition” (1940) 5 \textit{Georgetown Law Journal} 585, 604.
master of the market” for European news after October, 1916, and especially if they were taking advantage of the fortunes of war to strike at their rivals at International News when the latter were at their weakest, and perhaps for no fault of their own, then Associated Press themselves were more than arguably guilty of a “violation of the competitive order as such.” Once again, one regrets that Callmann did not find the occasion to provide an integrated analysis of International News from the two standpoints of unfair competition, and antitrust law.\textsuperscript{168}

**Conclusions**

**Unfair competition in the common law after International News**

Taking stock of the situation in 1983, so rather less than a decade after Callmann’s death, Douglas Baird was satisfied that:\textsuperscript{169}

“\[C\]ontrary to the fears of Brandeis, Hand, Kaplan, and others, the doctrine [of misappropriation] has flourished in the state courts without impeding the free flow of information.”

However, while this might have been true in respect of the narrow form of the doctrine with regard to the protection of news as such, and some other kinds of valuable but transitory intangibles, from a wider point of view the proposition that the misappropriation doctrine had flourished is hardly borne out by the examples Baird cites.\textsuperscript{170} In fact, if the doctrine of International News\textsuperscript{171} could be said to have flourished at all, that could only have been because the prospects for its continued survival after the decisions of the Supreme Court in Sears Roebuck v Stiffel\textsuperscript{172} and Compco v Day-Brite\textsuperscript{173} had appeared so bleak; and if it had

\textsuperscript{168} In fairness to Callmann, he was not alone in this. Only a few of the many articles on International News cite the 1945 antitrust case, and then mainly for factual background. A notable exception is Baird “The Story of INS” in Intellectual Property Stories, 2006. Otherwise the most acute appreciation (although it mentions International News only twice) is by Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain” (1999) 74 New York University Law Review 354.


\textsuperscript{171} \(1918\) 248 U.S. 215.

\textsuperscript{172} Sears Roebuck & Co v Stiffel Co (1964) 376 U.S. 225.

\textsuperscript{173} Compco Corp v Day-Brite Lighting, Inc (1964) 376 U.S. 234.
done little to impede the flow of information, then that was at least partly because its legacy had been so sparse and so fragmented. Baird continues:174

“The history of INS in the courts over the last sixty-five years shows that it has not, as some feared, been a persistent heresy that has engulfed all it touched. The case has been cited for the general proposition that courts have the equitable power to do what is fair, but these cases typically invoke INS in dictum simply as a rhetorical flourish and are usually well-founded upon a simple passing off or unfair trade practice of one variety or another. Courts have usually rejected claims based on a misappropriation theory in cases in which plaintiffs have tried to claim exclusive rights in an unpatentable device.

INS has served as the basis for protection of information a plaintiff has gathered, but courts have not used it as a license to cut rough justice wherever they find competitive practices they do not like. Many of the cases that have cited INS, for example, have simply reaffirmed its holding as applied to similar facts. These cases sometimes arise when a radio station forgoes subscribing to a news service, buys a copy of a local newspaper, and then paraphrases it over the air. Other cases involve specialized trade papers that carry information to a specialized market, such as a newsletter about new construction targeted at those in the building industry. Another subset of cases invoking INS involved record piracy, an area in which states, before the Sound Recordings Act of 1971 could create intellectual property rights without upsetting any congressional balance. The protection against record piracy these cases established was largely identical to the protection Congress itself eventually provided. In other areas, such as the right of publicity, courts relied upon INS only until these new rights acquired their own separate identity.”

While Baird might have been impressed by this catalogue of achievement, he was thinking predominantly in terms of misappropriation of certain fairly well-defined kinds of information, whereas Callmann, for instance, thought in terms of the misappropriation of every kind of valuable intangible which had been created by human effort, ingenuity, or investment—and perhaps more broadly still. In his 1940 article on unfair competition, Callmann's own mentor Zechariah Chafee Jr. had foreseen three possible futures for the law of unfair competition: “conservatism”, which speaks for itself, and in which the law would have remained attached to passing-off; “conquest”, in which International News was to be applied to its fullest possible extent, and lastly “exploration”:175

“Instead of either standing pat or rushing blindly into a great unmapped territory, the courts can feel their way cautiously out beyond the passing off cases and block out a few new kinds of standardized wrongs. Certain areas have already been sufficiently opened up to be taken over at once. Others can be put aside until we know more about them. And the courts may think it wise to keep permanently away from some competitive injuries, leaving the

There was indeed a kind of creeping commodification of certain kinds of information in a succession of cases which followed the precedent set by *International News*, at least in so far as those cases recognised or created rights in forms of information which were not then subject to copyright protection. However, there was little indication by the 1980s that the doctrine of *International News* was being applied any more widely than this, and that remains the situation to this day. The courts’ policy was indeed one of “exploration”, rather than “conquest”. More cautious than Baird, the *Restatement, Unfair Competition*, stated in 1995 that *International News*: \(^\text{176}\)

“[R]ecognised a common law tort of ‘misappropriation’ that afforded protection against the appropriation by a competitor of commercially valuable information otherwise in the public domain. Although the decision has been frequently cited, it has been sparingly applied. Notwithstanding its longevity, the decision has had little enduring effect.”

And after mentioning trade secrets, the *Restatement* continued: \(^\text{177}\)

“Although courts have occasionally invoked the *INS* decision against other commercial appropriations, they have not articulated coherent principles for its application. It is clear that no general rule of law prohibits the appropriation of a competitor’s ideas, innovations, or other intangible assets once they become publicly known. ... The better approach, and the one most likely to achieve an appropriate balance between the competing interests, does not recognize a residual common law tort of misappropriation.”

So there was certainly no general movement of unfair competition law away from the central importance of misrepresentation, and towards misappropriation. Rather, there was a succession of isolated, and rather disjointed, exploratory initiatives—each of them owing something to *International News*, something to Lockean property theory, some turns of phrase to the traditional rhetoric of natural rights, and a great deal to good old-fashioned common sense—which taken together tended to result in the recognition (or rather the creation) of narrowly-
defined *ad hoc* proprietary or quasi-proprietary rights just outside the limits of copyright law, and ostensibly under the aegis of the law of unfair competition.\(^{178}\)

**“Unfair competition”, or quasi-copyrights for new kinds of information?**

As recounted above, most of the legal innovations in United States law which bear the mark of *International News*\(^{179}\) tend to lie closer in principle to the field of copyright, than to unfair competition. This had nothing to do with any principled allocation of rights between copyright and unfair competition, and everything to do with the fact that the latter was reserved by the Tenth Amendment to the States,\(^ {180}\) whereas the former was subject to Federal pre-emption under the patents and copyright clause of the Constitution.\(^ {181}\) Rudolf Callmann is of course cited in the *Restatement*,\(^ {182}\) but he was not generally credited as having contributed significantly to these phenomena, and if his *Louisiana* article is anything to go by then I cannot imagine that he would much have approved of them.\(^ {183}\)

One of the reasons why the law developed in this way was that businesses looked to the law of unfair competition to get them out of trouble after they had failed to register catalogues and similar kinds of sales literature with the Register of Copyrights, thereby allowing their contents and artwork to enter the statutory public domain.\(^ {184}\) Another was to be found in then-current interpretations of the patent and copyright clause of the Constitution, and the related doctrine of Federal pre-emption, which tied copyright protection to what now seems to have been an unduly conventional view of authorship, and which hindered its extension to new situations

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\(^{178}\) Like Michael Spence, “Passing off and the Misappropriation of Valuable Intangibles” (1996) 112 LQR 472, I do not include Wendy Gordon as either drawing on, or contributing to, a distinct intellectual tradition beginning with Callmann. Gordon, “Owning Information” (1992) 78 *Virginia Law Review* 149 does indeed put forward an argument for liability for “reaping without sowing” which is based on restitutionary principles, but she makes no mention of Callmann, and her approach seems to me to mark an entirely fresh approach to *International News* based on a combination of law and economics theory, the burgeoning of then recent (post-Goldstein) caselaw, and the contemporary wave of interest in restitution for unjust enrichment. Callmann would have known nothing about “asymmetrical market failure”; and Gordon’s analysis, too, ultimately leads in a very different direction to Callmann’s. Most recently, Shyamkrishna Balganesh, “‘Hot News’: The Enduring Myth of Property in News”, (2011) 111 *Columbia Law Review* __ (forthcoming) not only acknowledges Callmann, but does so within a conceptual framework which Callmann would have recognised.

\(^{179}\) (1918) 248 U.S. 215.

\(^{180}\) Constitution of the United States of America (1787), 10\(^{th}\) Amendment.

\(^{181}\) Constitution of the United States of America (1787), Article 1, Section 8, Clause 8.


\(^{184}\) Until the Copyright Act 1976, common law copyright expired on publication, and statutory copyright was dependent on notice and registration.
and technologies, until new paradigms of “author” and “work” eventually became so familiar as to be foisted retrospectively on the hapless and unwitting founding fathers. Partly it was because of the United States’ disengagement from the major international conventions on copyright and neighbouring rights. Not for the United States the obligations of the Berne and Rome conventions, meaning that the subject matters of many kinds of “thin” or “entrepreneurial” copyrights, as well as performing rights and neighbouring rights in general, initially had to look for common law protection—ostensibly as a matter of unfair competition law—if they were to be protected at all. As soon as such protection had become routine and uncontentious at state level, Federal legislation tended to follow, with the rights in question being welcomed into the Constitutional Pantheon of copyright law.

If this contrast between the particular and the general is surprising, then part of the answer again comes from the proposition that “what is everybody’s business is nobody’s business.” Callmann thought on a grand scale, and undoubtedly believed that his version of a reformed and unified law of unfair competition based on the Leistungsprinzip would benefit all (honest) competitors, and indeed the whole of society. But legal reform is more likely to happen when a particular social grouping has a special reason of its own for pursuing reform, albeit a narrow and purely selfish one. Thus Callmann was relatively successful in his advocacy for the doctrine of trade mark dilution, not least because trade mark owners formed an organised and influential interest group, and could see how the doctrine would benefit themselves, both individually and collectively—whereas his personal vision of a new law of unfair competition stood to benefit no one in particular, and must have frightened more than a few.

Piecemeal innovation of the kind foreseen by Chafee had the advantage of being altogether more predictable in its intended consequences and its indirect side-effects. The courts did not have the problem, always inherent in a wide reading of International News, of not knowing where it all would end. In each successive case it ended where it began, with protecting rights

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187 Or for protection under state unfair competition statutes, broadly construed.
188 See below, fn. 208.
in sports events,\textsuperscript{189} or performing artists,\textsuperscript{190} or stock-market prices,\textsuperscript{191} or sound recordings,\textsuperscript{192} or whatever was to do with the case in hand. No suggested increment in the law was predetermined by what had gone before, any more than it was determinative of what other increments might follow, even in the same state or the same circuit. Modest legal innovations such as that in \textit{Capitol Records v Spies} pleased a well-defined constituency and threatened no one except the actual defendants (who, since they were acting unfairly, were beyond the pale of the law), and a few others in exactly the same position, who \textit{ex hypothesi} were no better and no more deserving. Fearful metaphors of “floodgates” and “uncharted waters” were wholly inappropriate as long as the law advanced in this step-by-step fashion, partly by analogy and common sense, partly by slogan and platitude, but with no thought for the seven-league boots of principle, whether legal, moral, or economic. The common law is atomist and pragmatic whereas Callmann would be holistic and principled (if one agrees with him), or dogmatic and pretentious (if not). Overarching theories of reward, incentive, and desert are for the nominate intellectual property rights such as patents, copyrights, and designs; not for unfair competition.

\textbf{Callmann and American legal thought}

In the last resort it is hard to say just how influential Callmann was in his adopted land, but in the case of misappropriation as unfair competition, and \textit{vice versa}, one has to say that the appearances are very much against him. So far as the cases are concerned, the simple fact is that though \textit{International News}\textsuperscript{193} did not become entirely moribund, none the less it never developed in anything like the way Callmann intended. The case law and secondary literature on \textit{International News} are vast, far too vast for this article to attempt a systematic survey of Callmann’s influence within it. What can be said, however, is that most of the academic literature on the misappropriation doctrine lets \textit{International News} speak for itself, and either ignores Callmann’s theorising altogether, or relegates him to the status of one commentator among many.

\textsuperscript{189} \textit{Pittsburgh Athletic Co. v KQV Broadcasting Co.}, 24 F. Supp. 490 (D. Pa. 1938); \textit{United States Trotting Ass’n v Chicago Downs Ass’n}, 665 F.2d 781 (7th Cir. 1981).

\textsuperscript{190} \textit{Metropolitan Opera Ass’n v Wagner-Nichols Recorder Corp.}, 199 Misc. 786, 101 N.Y.S.2d 483 (1950), affirmed 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

\textsuperscript{191} \textit{Bond Buyer v Dealers Digest Pub. Co.}, 25 A.D.2d 158, 267 N.Y.S.2d 944 (1st Dep’t 1966).


\textsuperscript{193} (1918) 248 U.S. 215.
It is entirely possible that the revival of the misappropriation doctrine in the 1950s and early 60s, which culminated in—and was briefly thwarted by—the twin Supreme Court cases of *Sears*[^Sears] and *Compco*[^Compco] was at least partially inspired by Callmann’s work, albeit with little direct attribution.[^Callmann] On the other hand, it is equally possible that Callmann’s forthright opinions and far-ranging conclusions frightened even his supporters, and alerted his opponents to the issues at stake. After all, it was the opponents of the misappropriation doctrine who arranged for it to meet its intended nemesis, the doctrine of federal pre-emption, in the Supreme Court in *Sears* and *Compco*. The actual plaintiffs had argued their cases on the entirely conventional basis of acquired secondary meaning and likelihood of confusion.

I cannot identify any single author in American legal literature who can really be said to have adopted Callmann’s views on unfair competition as their own. This is perhaps the more surprising, when the first edition of Callmann’s American textbook[^Callmann] was so well received by his peers.[^CallmannReview] Yet Callmann’s work had its flaws as well as its virtues: to some readers and critics it was too idiosyncratic, too dogmatic, too theoretical, and too narrowly aligned with the interests of trade mark owners.[^CallmannReview] One challenge Callmann never really overcame was the lowly status of the common law textbook author, which was (and is) altogether different to that

[^Sears]: *Sears Roebuck v Stiffel* (1964) 376 U.S. 225.

[^Compco]: *Compco v Day-Brite* (1964) 376 U.S. 234.

[^Callmann]: Callmann, *Unfair Competition and Trade-Marks*, 2nd ed, 1950, (misspelt “Callman”) was cited by the respondent in its brief in *Compco*, but only for the rather limited proposition that the right to copy patented articles did not extend to situations where the public was deceived; and not at all by the Court. Callmann was not cited at all in the reported judgments of the lower courts in either *Sears* or *Compco*, although it must be said that in the Circuit courts both cases turned on the presence or absence of secondary meaning, and did not involve consideration of the misappropriation doctrine as such. Callmann’s response to *Sears/Compco* in the third (1967) edition of his American textbook was dismissive: “Sears and Compco should ... be relegated to the limbo of judicial abberations and any suggestion that they have sounded the death knell of the INS doctrine should be rejected.” (Quoted in *Book Review*, (1970) 15 *Antitrust Bulletin* 859.}

[^CallmannReview]: See the reviews by Stephen Ladas (“S.P.L.”) (1945) 35 *Trademark Reporter* 150 (“one of the most important works on Unfair Competition ... that has been published in this country”); S. Chesterfield Oppenheim (1946) 15 *George Washington Law Review* 116 (“an admirable product of many years of painstaking and assiduous labors” and commenting that “the author has seized every opportunity to demonstrate the inadequacy of the existing narrow basis of relief in private suits”); Zechariah Chaee, Jr. (1948) 61 *Harvard Law Review* 562 (“three conspicuous merits” in terms of range, comprehensiveness of coverage, and interest in legal theory). There was even a highly favourable review for English readers (by Peter Meinhardt) at (1949) 12 *Modern Law Review* 123.

[^CallmannReview]: Hence the approval which greeted the publication of J. Thomas McCarthy, *Trademarks and Unfair Competition* (Rochester, N.Y., Lawyers Co-operative Pub. Co., 1973), which was more than competitive with Callmann in terms of organisation, analysis and comprehensive coverage, but which eschewed Callmann’s subjectivity and preoccupation with theory.
of the lofty rank of the German commentator. As we have seen, members of the latter class were exalted in their own lifetimes as the living equivalents of the great jurisconsults of Ancient Rome; but the Roman jurisconsults are long-since dead, and for the common lawyer his own death, preferably long-since, is the inexorable rite of passage between the living indignity of authorship, and the distant and uncertain prospect of apotheosis as a work of authority. So we come back to the fact that the main role of the common law textbook writer was to expound the law and to provide easy and comprehensive access to the multiplicity of previous judicial decisions, and not to make ex cathedra pronouncements of his own devising.

**The limits to Callmann’s legacy**

Rudolf Callmann’s rather limited degree of success in popularising the misappropriation doctrine of *International News v Associated Press* in his adopted country, at least during his own lifetime, may be compared to two other areas in which he was initially at odds with mainstream American legal thought. On the one hand, there is liability for truthful commercial disparagement and comparative advertising. Here, Callmann wholeheartedly advocated the Franco-German orthodoxy that businessmen should confine themselves to (over)-praising their own wares, and that any adverse comments at all about a competitor’s goods or business were actionable, absent very special circumstances, regardless of whether they were true or false:

> “When is a competitor, who is undeniably permitted to sell his product on its own merits, justified in referring to a business rival and his goods? The answer is: ‘Only when there is an inevitable necessity.’”

In this case it can thankfully be said that Callmann met with no success whatsoever. Anglo-American common law remains committed to the primacy of freedom of expression, in commerce as well as in politics, and therefore imposes liability only for disparaging statements...
which are false, as well as damaging. Most recently even German law has taken a similar position, for economically liberal reasons, under the direction of the European Community.\footnote{Ansgar Ohly and Michael Spence, \textit{The Law of Comparative Advertising: Directive 97/55/EC in the United Kingdom and Germany} (Oxford: Hart Publishing, 1999).}

At the opposite pole there is the doctrine of trade mark dilution. This was first advanced by Frank Schechter in an article of 1927,\footnote{Frank I. Schechter “The Rational Basis of Trade Mark Protection” (1927) \textit{Harvard Law Review} 813. Though misappropriation in the \textit{International News} sense is not inherent to dilution theory, there is some potential for overlap. See Ilanah Simon Fhima, “Dilution by Blurring—a Conceptual Roadmap” [2010] I.P.Q. 44.} but in the following two decades it attracted little except academic attention, and that not always favourable.\footnote{Schechter’s thesis was subjected to a short but memorable annihilation in Felix S. Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35 \textit{Columbia Law Review} 809.} Callmann adopted the idea and gave it an intellectual coherence it had conspicuously lacked in Schechter’s original article, and, perhaps more importantly, a simple and sympathetic name.\footnote{Robert G. Bone, “Schechter’s Ideas in Historical Context and Dilution’s Rocky Road” (2008) 24 \textit{Santa Clara Computer & High Technology Law Journal} 469. Curiously, although Schechter himself referred to the mark being “diluted” (from the German, “verwässert”, at page 852), he did not take the logical step of naming his doctrine “dilution”.} Callmann was a vociferous and enthusiastic advocate of Schechter’s doctrine, and it is entirely credible that his reworking of the original doctrine, and his persistent advocacy for it from 1945 onwards, did much to rescue it from obscurity and establish it in the mainstream of legal thought.

The misappropriation doctrine of \textit{International News} falls between these extremes. In his lifetime, Callmann enjoyed some very limited success in getting it accepted in court. However, the concept of unfair competition by misappropriation does now seem to have a far higher profile among commentators and academics in the common law world at large than would have been true during Callmann’s active working lifetime, and I am inclined to give him at least some of the credit, especially for his widely-cited \textit{Harvard} article.\footnote{Callmann, “Unjust Enrichment” (1942) 55 \textit{Harvard Law Review} 595.} Conversely, it is not hard to believe that his treatment of \textit{International News} in successive editions of his American textbook played a significant part in at least keeping it within the attention of practitioners.

\textbf{Unfair competition and misappropriation: the tidal wave effect}

There is a certain amount of irony in the fact that Callmann may have had more influence outside America in recent decades than in his adopted home and in his own lifetime. This state of affairs, and especially the attention given to his \textit{Harvard} article,\footnote{Callmann, “Unjust Enrichment” (1942) 55 \textit{Harvard Law Review} 595.} may owe more than a
Rudolf Callmann and the misappropriation doctrine


There was one precursor to this phenomenon who owed nothing to fashion, in that Professor W. L. Morrison in 1956 dealt quite extensively with \textit{International News};\footnote{(1918) 248 U.S. 215.} and with Callmann’s whole approach to unfair competition, and was acutely critical of the latter.\footnote{W. L. Morrison, “Unfair Competition and Passing-off: the Flexibility of a Formula” (1956) 2 \textit{Sydney Law Review} 50.} Conversely, in his 1972 article William Cornish cited Callmann only twice: once in a minor footnote reference to \textit{International News}, and once to dismiss his argument on a very peripheral point.\footnote{Cornish, “Progress Report” (1972) \textit{Journal of the Society of Public Teachers of Law} 126 at p. 128 fn. 2, and p. 145, fn. 1, the latter dealing with accessories and spare parts.} By way of contrast, one need only read the title of Sam Ricketson’s 1984 article\footnote{Sam Ricketson, “‘Reaping without sowing’: Unfair Competition and Intellectual Property Rights in Anglo-Australian Law” (1984) 7 \textit{University of New South Wales Law Journal} 1.} to guess that both \textit{International News} and Callmann’s \textit{Harvard} article would be prominent, as indeed they are; and Callmann’s influence is even more pronounced in Andrew Terry’s article of 1988.\footnote{Andrew Terry, “Unfair Competition and the Misappropriation of a Competitor’s Trade Values” (1988) 51 \textit{Modern Law Review} 296. Callmann’s \textit{Georgetown} article of 1940, much more rarely cited than the \textit{Harvard} article of two years later, is described on the first page as “definitive”.} It may be noted that these authors were all Australians, which may be the more remarkable when one considers that in the \textit{Victoria Park} case,\footnote{\textit{Victoria Park v Taylor} (1937) 58 C.L.R. 479 (High Court of Australia, Full Court).} the High Court of Australia had refused to follow the majority in \textit{International News}, with Dixon J. delivering a magisterial judgment endorsing the dissenting opinion of Justice Brandeis. Finally, there is Anselm Kamperman Sanders,\footnote{Anselm Kamperman Sanders, \textit{Unfair Competition Law: The Protection of Intellectual and Industrial Creativity} (Oxford: Clarendon Press; 1997).} whose debts to Callmann are obvious.

Just as Callmann had begun the American phase of his intellectual career by reaping the fruit of a native doctrine whose seeds he had not sown, so he may be said to have ended it by posthumously riding the crest of a restitutionary wave which he had not created, though he can hardly be denied the credit for spotting it fully half a century before its significance was widely
appreciated by the majority of common lawyers. But having begun this article by asking how important Callmann was in fostering interest in *International News*, and approval of its doctrine of misappropriation, whether within the United States or outside, I have to confess that at the end I simply cannot tell.

**Problems of causation and attribution**

Part of the problem is that the misappropriation doctrine is so simple and potentially all-embracing that it can be impossible to be sure in any particular case that a nominate legal principle is at work at all, and all the more difficult to say where the idea came from on that occasion. Even Callmann’s apparent idiosyncrasies, such as his devotion to the values of *Leistungswettbewerb*, are idiosyncratic only from the viewpoint of a particular, common law, tradition. In Germany they would once have been mainstream.

I may know, for instance, that Kamperman Sanders\(^\text{219}\) cites four of Callmann’s articles,\(^\text{220}\) and it may be that much of his thought on “malign competition” seems to be very much in the same vein as Callmann’s, but I do not know to what extent he was actually influenced by Callmann’s augments, or by Justice Pitney’s magniloquence, or by Roman, Dutch or German legal thought, or by the inherent attractions of the doctrine—be they genuine or specious. Nor do I know whether Callmann’s own ideas about fair and unfair competition seemed to him at the time to be entirely original and novel, or rather to have the character of eternal and self-evident truths which he was simply repeating. Indeed, writing as an English commentator, I cannot readily say to what extent the opinions Callmann expounded in his American period were of his own creation. There were certainly plenty of antecedents for his views in German legal scholarship—not all of them fully acknowledged—even though there may have been no complete anticipation.\(^\text{221}\)


\(^{220}\) I.e. the *Georgetown, Louisiana* and *Harvard* articles; as well as Callmann, “Unfair Competition in Ideas and Titles” (1954) 42 *California Law Review* 77.

\(^{221}\) Callmann explicitly acknowledged the influence of Lobe, *Der unlautere Wettbewerb*, 1907, not least for the metaphor of competition as a boat race, in which it would be unfair for one competitor to install an engine, above, fn. 61. Of his German contemporaries, the only one to be acknowledged by name in the three articles under consideration was Böhm, *Wettbewerb und Monopolkampf*, 1933. The reason may partly have been ideological sympathy with Franz Böhm’s nascent ordoliberalism, and partly personal, since Böhm was expelled from his university lectureship for opposition to Hitler’s racial policies, while the leading figures who had contributed to the development of German unfair competition law in the 1930s (notably Hans Nipperdey and Eugen Ulmer) kept their chairs. The theoretical machinery of Böhm’s treatise was based on *Leistungswettbewerb*, and Böhm (unlike Nipperdey) acknowledged Callmann’s own contribution to the literature.
Despite some superficial appearances to the contrary, Callmann was no forerunner of modern law and economics techniques, and much of his writing would now seem incredibly naïve from that perspective. Callmann was also surprisingly ill-attuned to the mainstream American legal philosophy of intellectual property rights, with its preoccupation with Locke’s labour theory, and its Madisonian determination to find property rights anywhere and everywhere, even in something as evanescent as “hot news”. While Callmann and the neo-Lockeans might agree that work, labour, effort or striving were the basis of something worth protecting, they could not agree about the next step. Lockeans would head straight for a full property right of some kind, and not draw breath until they found one; whereas for Callmann, there was much more to property than mere labour, and the fact that the action for unfair competition did not directly protect a property right was one of its most important defining features. To this extent I cannot even agree with Baums that Capitol Records v Spies was a ringing endorsement of Callmann. It was rather more of an example of the Lockeans and certain business interests making common cause with him in the short term and for purely tactical reasons, before sound recordings attracted Federal copyright protection.

More generally, if misappropriation is adopted as the basis for a particular decision on a particular occasion, then to what extent is that due to the merit, or the timeliness, or the expediency, of the message; and to what extent to the persistence or persuasiveness of the messenger—and which messenger, when there may have been many more than one? Callmann, in his German period, may have coined the term Leistungswettbewerb, but to what extent was he merely giving expression to the Zeitgeist? In the last resort it is impossible to say.

**Unfair competition law as a force for progress?**

With Callmann as one of his guides, it is perhaps not surprising that Kamperman Sanders is one of very few authors writing in English who should have equated unfair competition law with “the protection of intellectual and industrial creativity”. Nor is it surprising that he should have attempted to formulate his law of “malign competition” along restitutory principles, again rather like Callmann, suitably updated by reference to the law and economics approach of Wendy Gordon, though he was profoundly mistaken if he thought that this particular mélange would appeal to the traditionally-minded common lawyer, any more than a dish of escargots bourguignonnes is likely to delight a diner who loves neither snails nor garlic.

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Not so Callmann, who would enthusiastically have embraced Leistungswettbewerb as a force for progress, at least in principle, even if its practical effect was to make business life almost alarmingly exciting.\[^{225}\]


Whether this was really true in practice is another matter. In Germany, the “classical model” of unfair competition continued for most of the 20th Century to define “fairness” (or “guten Sitten”) by reference to the stolid bourgeois values of the kind of businessmen epitomised by the Schröter family in Gustav Freitag’s novel Soll und Haben,\[^{226}\] whose main defining characteristics seem to have been their steadfast attachment to the social and economic status quo of mid-19th Century Mitteldeutschland, and their unswerving and self-serving opposition to all methods of marketing, advertising, and business organisation devised since then.\[^{227}\] And in the United States, when it came to the so-called “Fair Trade” acts of the New Deal era and later, which not only legitimised resale price maintenance, but made compliance compulsory, Rudolf Callmann was all in favour.\[^{228}\] He even seems to have thought that price-fixing was

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\[^{225}\] Callmann, Der Unlautere Wettbewerb, 1929, at p. 19; Callmann, Der Unlautere Wettbewerb, 2nd ed., 1932 at p. 23. In free translation by the present author: “Of course the competitors of the present time do not fight one another with the same weapons as gladiators in the arena … but rather with every instrument at their disposal, as in warfare. The only restrictions as to what is permitted in the cut and thrust of competition are those imposed by the law. It is therefore altogether mistaken to attempt to prohibit innovative methods of competition simply on the grounds of their novelty. The powerful law of inertia, and the spirit of complacency, all too often tempt competitors to resent every bold innovation in ways of doing business. If the competitive conduct in question is to be adjudged as unfair and unlawful, then there must be some factor in addition to its mere novelty to condemn it.”

\[^{226}\] Gustav Freitag (or Freytag), Soll und Haben (“Debit and Credit”), (1855).


\[^{228}\] Callmann, “Unfair Competition and Antitrust” (1968) 12 IDEA (Conference Issue) 137, 140.
entirely consistent with his *Leistungsprinzip*. According to him, price-cutting (“even by non-signers”) was unfair competition, and trade mark owners were under a duty to stamp it out.

**The morality of reaping without sowing reconsidered**

It may have been obvious to the reader for some time now that I am fundamentally sceptical about the value of *International News,* whatever Rudolf Callmann had to say for it, and that I notionally align myself with Justice Brandeis. To my mind, too, Callmann’s *Harvard* article is actually the least interesting of his texts examined here, though the best known, partly because it is less original and less ambitious than the *Georgetown* article especially, and less complete than the developed doctrine of his American textbook; and partly because it is unlikely to convert anyone to whom it is not already instinctively obvious that “reaping without sowing” is morally wrong, and that legal liability ought to follow.

To this extent, what success Callmann had in America with his version of the doctrine of misappropriation may have owed less to his own efforts, and more to the fact that he was tapping into a strong intuitive sense of home-grown morality, and an equally strong (but logically distinct) neo-Lockean philosophy of personal property. It is especially ironic that, post-*Harvard,* Callmann himself had repudiated all such over-simplified trains of thought.

Certainly, the misappropriation doctrine requires a much more sophisticated analysis than that of Justice Pitney if it is to stand as a useful principle, as opposed to being a useful stick with which to beat the occasional dirty dog, such as Hearst. Callmann tried but failed, and was perhaps too ambitious to have succeeded outside his native Germany. Invoking Benjamin

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229 As early as the 1930s *Leistungswettbewerb* had turned out to be no less Delphic than the Oracle of Apollo as a guide to practical affairs. In the classic *Benrather Tankstelle* case, above, fn. 58, a group of petrol stations had formed a cartel or combination to fix prices and drive an independent competitor out of business. Professor Nipperdey argued that this was a legitimate example of *Leistungswettbewerb.* The *Reichsgericht* (RGZ 134, 342) agreed with Nipperday’s theoretical distinction between *Leistungswettbewerb* and *Behinderungswettbewerb,* but held that the combination was illegal under the law of unfair competition, there being no relevant antitrust law to govern.

230 Callmann, “Unfair Competition and Antitrust” (1968) 12 *IDEA* (Conference Issue) 137, 140.

231 (1918) 248 U.S. 215.


233 So for example Gordon, “Owning Information” (1992) 78 *Virginia Law Review* 149, 156, speaking of “an intuition of fairness—a norm often linked to natural rights—that one should not ‘reap where another has sown.’”

234 See above, at fn. 130.
Gary Myers points to the sheer unclarity in the practical application of the original doctrine, and its underlying lack of any moral or utilitarian basis:

“Misappropriation involves reaping where one has not sown. Yet it is unclear what must be sown or how one cannot reap. Without these limits, the misappropriation tort is easily misunderstood by lawyers, judges, and juries. Users of information in the public domain have no guidance as to their potential liability for use of information that someone may deem to be proprietary. To quote Benjamin Kaplan’s seminal work, ‘[I]f man has any “natural” rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and “progress,” if it is not entirely an illusion, depends on generous indulgence of copying.’”

This is all the more true when one is dealing with the “misappropriation” of supposed “property” which is immaterial or intangible, such as news. Whereas more than one person cannot, generally speaking, enjoy possession of the same piece of physical property at the same time as another—possession is rivalrous, as economists say—there is no such difficulty in many persons simultaneously enjoying the intangible, provided they do not expect to assert mutually exclusive rights over it. As Baird noted, the metaphor of “reaping without sowing”—already dangerous enough in relation to tangible things—simply did not apply to the intangible:

“That an individual has the right to reap what he has sown, however, is far from self-evident even as applied to tangible property. We cannot talk intelligibly about an individual’s rights until we have established a set of entitlements. We typically can reap only the wheat we sow on our own land, and how land becomes private property in the first place remains a mystery. In any event, wheat and information are fundamentally different from one another. It is the nature of wheat or land or any other tangible property that possession by one person precludes possession by anyone else. A court must decide that A should get the wheat or that B should get the wheat. It cannot decide that both get all of it. Many people, however, can use the same piece of information. Millions can watch the same television program without interfering with one another. The value of the information to AP derived in part from its ability to keep its rivals from copying the information it gathered. But deciding that it could not enjoy its news exclusively is not the same as telling a farmer he must hand over wheat he has grown to someone who merely watched him grow it. Deciding against AP would not mean that it would lose all revenue from its news-


gathering efforts. People would still pay for the AP’s news, and its rights would be entirely unaffected in the towns that the AP served exclusively.”

Readers who know Munich might like to compare the thought at the end of the first paragraph to Weiss Ferdl’s riddle about one of the city’s iconic churches: “Why does the clock of Alte Peter have eight faces?” Answer: “So that eight people can tell the time at once.” And he’s right too, they can.

Orders of conflict, and of peace

Callmann’s somewhat Manichaean theory of competition seems to have changed remarkably little throughout his life. One need only compare his Georgetown article, at the beginning of his American career, with that in IDEA, towards its end. Instead of a boat race we now have a horse race, but we still have the two spheres of life, in which the competitive sphere is “essentially an order of continuing struggle, where conflict, under certain rules of play, is the desideratum.” And the rules against unfair competition are still designed not to bring peace to commercial conflict, but to ensure that the struggle continues, albeit according to certain rules. At first sight, this all seems rather brutal, indeed almost Hobbesian:

“The rules against unfair competition—or more affirmatively the rules of fair competition—are not designed to bring peace to commercial conflict but to insure its continuance. For this reason, I believe that in the same sense the order of peace is violated by conflict, the order of conflict is violated by peace or by ignoring the underlying rules of the struggle.”

However, when we look more closely, it turns out that all that fighting talk about struggle and conflict is just that: talk. The Health and Safety people had been at work, even in Callmann’s time, and his sphere of conflict is scarcely any more dangerous than the sphere of private life, if at all. It is like a mediaeval tournament, in which the knights are ransomed, but never killed; or the Schlager duel of German students, in which only superficial wounds are inflicted; or the Wild West of a movie studio’s theme park.

So far as competition is concerned, once Callmann’s set of “rules of the game” are in place, then the only kind of conduct which is permitted is that epitomised in his concept of Leistungswettbewerb, which means getting through life by one’s own efforts, unaided and unimpeded by others. So although individual effort is praised, and emulation in a rather abstract sense is permitted, imitation is strictly prohibited, as is every kind of interference or interaction with the other competitors, whether mental or physical. It is as if one were


\[239\] Callmann, “Unfair Competition and Antitrust” (1968) 12 IDEA (Conference Issue) 137, 139.
promised a ringside seat at a bare-knuckle prize fight, only to find that the competition ended with the weigh-in. All the contestants can do is preen and prance, and congratulate themselves on their good looks and physical development. They may boast and brag, but they may not so much as bad mouth one another. Far from Callmann's sphere of struggle being the natural milieu of those two fabulous monsters of American popular mythology, the social Darwinist and the robber baron capitalist, it turns out to be a remarkably safe and even narcissistic place. One is again reminded of the *Iliad*: When Glaucus the Lycian actually meets his opponent Tydides (or Diomedes) in battle he dutifully recites the formula taught to him by his father “always to be the first …”, 240 but within a few lines the two enemies are so enraptured by one another’s bearing and noble ancestry that instead of fighting they agree a personal cease-fire, and exchange armour. More Greek camp, than *War Music*.

**Envoi**

If my judgment on Rudolf Callmann appears rather ungenerous, it is partly because I have largely confined myself to *International News*,241 and the specific issue of unfair competition by misappropriation, where in my opinion he ultimately fails to make that doctrine any more attractive or convincing than it was in the hands of Justice Pitney. In both cases, you either buy it instinctively, or you don’t. Callmann did. Like Brandeis, Holmes and Learned Hand, not to mention Sir Owen Dixon,242 I’m among those who don’t. Compared to Pitney, Callmann had by far the more formidable and critical intellect, but unlike some of his *émigré* contemporaries he seems to have arrived in America too late in life really to come to terms with the social and economic values of his adopted country, let alone with the full “inwardness” of the common law. As his mentor Zechariah Chafee, Jr., noted at the time,243 he still seemed to be on the outside, looking in. Although Callmann’s written English from 1945 onwards is generally excellent, and his command of sources is exemplary in its range and detail, one is constantly aware that he is still thinking in German. Unlike Justice Brandeis again, he seems to have lacked the basic judicial qualification of seeing all sides of an argument, except in an adversarial sense. He is formidably logical and well-informed, but his starting assumptions are pre-determined, and his logic is all one way. As Chafee again noted,244 Callmann’s approach is

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240 See above, fn. 60.
242 And not forgetting Spence, “Passing off and Misappropriation” (1996) 112 LQR 472.
too much that of a plaintiff’s lawyer. The arguments for a less protectionist, less doctrinaire, and less expansive reading of the law seem to have eluded him.

The contrast between Callmann’s rather cavalier lack of concern for freedom of expression (admittedly in what was ostensibly a commercial,\textsuperscript{245} rather than a political, context) with the record of Chaee himself is a striking illustration of several of these issues. It is ironic that Chaee, who as a young academic effected a famous conversion on Justice Holmes,\textsuperscript{246} and put his future career at risk with his outspoken support for the importance of freedom of expression in wartime,\textsuperscript{247} should have left so little impact on one of his own students in this respect—though Callmann was certainly not lacking in civic values or moral courage, as his signature on the constitution of the \textit{Reichsvertretung der deutschen Juden} showed. However, it is also indicative of Callmann’s own unalterable certainty of purpose and of his own rightness, which was the other side to all that constant striving. Perhaps the best statement of Callmann’s own personal \textit{agonprinzip} comes not from the \textit{Iliad}, nor even directly from Homer, but at one remove from the latter’s \textit{Odyssey}, as recounted by Tennyson: “To strive, to seek, to find, and not to yield.”\textsuperscript{248}

But this would be an altogether unfair note on which to bid good-bye to Rudolf Callmann. In his own striving, not merely for knowledge, but for understanding, in the difficulties he faced and overcame in his own life, and in his exertions for the dispossessed, Rudolf Callmann’s efforts and achievements were truly heroic in the best possible sense. His commitment to the benefits of free but orderly competition, and to civilised and liberal values in general, cannot be in any doubt; and nothing could be further from the mark than to accuse him of harbouring any sympathies for the industrial and economic policies of Nazi Germany, a charge which he rebutted with considerable dignity in his \textit{Georgetown} article.\textsuperscript{249} If he was not infallible in his judgements, then that is part of the destiny which comes with being human. Though I disagree with most of his conclusions, at least on the subject of misappropriation, I hope it has been clear throughout that I take his arguments very seriously indeed, and there are many insights to be gained from them.

\textsuperscript{245} Both in the specific case of comparative advertising and the like, above, fn. 204, and in the broader context of the issues arising in \textit{International News} itself, above fn. 160.

\textsuperscript{246} In \textit{Abrams v United States} (1919) 250 U.S. 616.


\textsuperscript{248} Alfred, Lord Tennyson \textit{Ulysses} (1842) \textit{ad fin}. (Emphasis added).

\textsuperscript{249} Callmann, “Unfair Competition” (1940) 5 \textit{Georgetown Law Journal} 585, 602, fn. 45.
One of these to which I certainly intend to return is the “two orders” theory of economic competition, which does seem to have considerable descriptive and analytical potential when freed from over-reliance on the impossibly idealistic and normatively ambiguous Leistungsprinzip, not to mention Callmann’s bewildering variety of similes and metaphors.\(^{250}\)

Another is the analysis of *International News* in terms of the (mis)appropriation of the output of the extended news-gathering organisation which had been assembled by Associated Press over many years, and which was (at least arguably), at risk of damage or outright destruction as a result. This approach is both more elegant, and in some respects more general, than the conventional analysis of the case in terms of “property in news”, or that unhappy platitude about “reaping without sowing”. In the final analysis, and as Callmann himself acknowledged, when it came to the really important ideas in life we are what we are because we did not hesitate to reap where we did not sow, as our parents and grandparents did before us.\(^{251}\)

“Consider Goethe’s query: ‘People are always talking about originality; but what do they mean? As soon as we are born, the world begins to work upon us, and keeps on to the end. What can we call ours, except energy, strength, will? If I could give an account of what I owe to great predecessors and contemporaries, there would be but a small remainder.’ And so it must be seriously doubted whether any law could or should prevent even conscious appropriation of knowledge, let alone the thorny problem of unconscious imitation.”

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\(^{250}\) The “two orders” theory was derived from Böhm, *Wettbewerb und Monopolkampf*, 1933, and was Böhm’s first attempt at describing an economic order which would satisfy the lawyer’s sense of justice, as well as the economist’s desire for efficiency, while avoiding descent into monopoly on the one hand, or economic anarchy on the other. At a late stage I have noticed the affinity between the “two orders” of Böhm and Callmann, and Tony Weir’s apophthegm that “social life must not be a jungle ... but economic life is bound to be a race”: see J. A. Weir, “Chaos or Cosmos? Rookes, Stratford and the Economic Torts” [1964] CLJ 225, 228. But Weir cites neither Böhm nor Callmann, and I do not know to what extent he may have been indebted to either of them.