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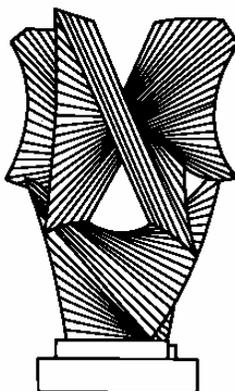
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## Property, Natural Monopoly, and the Uneasy Legacy of *INS v. AP*

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## Property, Natural Monopoly, and the Uneasy Legacy of *INS v. AP*

Douglas G. Baird\*

### Abstract

*International News Service v. Associated Press* held that a wire service had the right to prevent rivals from copying its bulletin. It established the doctrine of misappropriation and justified it on the ground that someone that invests in gathering and disseminating information is entitled to the fruits of its labor. The Supreme Court, however, missed the strong anti-competitive undercurrents in the case. INS and AP were not conventional rivals. The most important AP member (and the person who stood to gain the most from AP's anticompetitive activities) also owned INS. Far from being about first principles, the case illustrates how common law reasoning quickly loses its moorings in the absence of a bona fide dispute. The long-recognized failing of the case—that it sets out a principle with no obvious boundaries—was deeply embedded in the facts and illustrates, even in this iconic environment, that the domains of intellectual property and antitrust cannot be easily separated.

*International News Service v. Associated Press* has long occupied a prominent place in American legal education. As recounted in law school classrooms countless times, Associated Press and International News Service were rival wire services that spent millions gathering news, both in the United States and abroad, and disseminating it across the country. In 1916, INS began to copy AP bulletins as they appeared in East Coast papers and then wire them to the West Coast. INS newspapers there carried AP stories without attribution, even before their AP rivals. AP sued to stop this practice. It won in the Supreme Court on the ground that it enjoyed a “quasi-property” interest in the news it gathered and was entitled to the fruits of its labor.<sup>1</sup>

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\* University of Chicago Law School. I am grateful to Rochelle Dreyfuss, Jane Ginsburg, Douglas Lichtman, and Richard Posner for helpful comments on an earlier draft.

<sup>1</sup> Deciding the case in AP's favor required establishing a new legal principle. Copyright protects only expression, not underlying facts. Trade secret law protects news services from theft, but such protection disappears upon publication. Conventional unfair competition focuses on “passing off.” As applied in this context, unfair competition law prevented INS from presenting

The case has appeared in many contexts. It was prominently featured in Henry Hart and Albert Sacks's *Legal Process* materials, a mainstay of the first-year curriculum at Harvard and other law schools for decades. Hart and Sacks used the case to spark a classroom debate on the relative competence of judges and legislatures. Believers in the incremental power of common law reasoning argue against those who hold that the legislature is better equipped to balance competing public policies.

The case also serves to launch a general discussion on the nature of property rights. In the first-year property class, Lockeans who believe that property comes into being as a result of labor pit themselves against utilitarians who insist on weighing the costs and benefits of bestowing rights and denying them. The survey course on intellectual property uses *INS v. AP* to explore the tension dominating so much of intellectual property law: how to motivate creators to do their work while ensuring public access to the work once created.

*INS v. AP*, however, is not what it appears to be. In fact, the case has more to do with the regulation of a natural monopoly than with property rights. In the first part of the twentieth century, a wire service consisted primarily of a large network of leased telegraph lines. The expense of creating and maintaining such a network dwarfed the costs of actually gathering the information. These large fixed costs created a natural monopoly; how best to regulate it cannot be easily deduced from the principles that preoccupied the justices who decided the case or the legal academics who have taught it.

Making matters more complicated, AP magnified its own market position through its membership in an international cartel that gave it exclusive rights to

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its own news as that of AP, but *INS* was doing the opposite. It was presenting AP's news as its own.

bulletins of foreign news services and exclusive access to official government communiqués. No one else could provide foreign news of comparable quality. In addition, under AP's by-laws, no newspaper entering the market of an existing AP member could gain access to AP's wire service. AP members thereby protected their own market positions from competition from outsiders and from one another.

The litigation that generated *INS v. AP* was part of AP's larger program of navigating technological and economic change. AP's goals had little to do with INS. Indeed, contrary to the traditional account, there was no evidence that INS was copying bulletins on the East Coast and transmitting them to papers on the West Coast. The injunction AP sought (and eventually obtained) did not require INS to change its practices in any meaningful way—or indeed at all. More to the point,

General principles can be tested and tempered only when they are squarely contested. Hence, it should come as no surprise that the “quasi-property” right in news that the Court discovered in *INS v. AP* came without any metes and bounds and proved nearly impossible to apply in later cases. Even as applied to AP, the contours of the right were unclear. Indeed, only a decade and a half before this litigation, AP had argued that a property right in news did not prevent exactly the sort of copying that, by its account, INS was doing.

Understanding how AP came to promote the idea of news as property as part of a strategy to deal with technological and economic change is the focus of the first part of this essay. The essay then turns to the peculiar relationship between INS and AP. It concludes with a brief examination of the reception the case received in the lower courts. That the Supreme Court saw only high principle is perfectly understandable: the justices assumed, reasonably but wrongly, that the litigants before them were genuine adversaries. The hold that the case has had

over legal academics, however, is much more troubling and shows starkly how using canonical cases to understand first principles is a hazardous business.

### **The McCullen Brothers Steal from Melville Stone**

Melville Stone is the person most responsible for developing the idea of a property right in news and initiating the litigation in *INS v. AP*. He was preoccupied with the idea of a property right in news throughout his fifty-year career in journalism. The idea that news should be treated as property took hold while Stone was running the *Chicago Daily News* in the 1870s. Stone thought a set of norms should govern all newspaper editors. Among other things, they should not copy from one another. Papers ought to use their own resources to report on local as well as distant events.

In Stone's eyes, the McMullen brothers, who owned the rival *Post and Mail* in Chicago, were shameless pirates who epitomized everything that was wrong with journalism. Stone acquired stories at great expense, only to see them appear in the *Post and Mail* a few hours later. Stone's battle with the McMullens came to a head when Stone published the following story in the noon edition of his paper on December 2, 1876:

#### *Sad Story of Distress in Servia*

London, Dec. 2—A correspondent of the *Times* writing from Servia, where he has spent many weeks, says that the country presents a gloomy picture to the traveler. The land is devastated and the people are starving.

Everywhere he found men and women crying for food. He could see in any large village hundreds of young women in a state of semi-nudity. It has been a hard matter for the priests to keep the populace under their control. Children are starving by thousands throughout the country.

The men, young and old, go through the streets shouting for bread, cursing the rich for not coming to their aid. A few days ago the mayor of the provincial town of Sovik issued a proclamation ending with the ominous words: "*Er us siht la Etsll iws nel lum cmeht*" (the municipality cannot aid).

Upon reading this, the people, led by the women of the town, organized a

riot, in the course of which a dozen houses were pillaged and over twenty persons were brutally murdered.<sup>2</sup>

The McMullens bought a copy of the *Chicago Daily News* a few minutes after it hit the streets, and by three o'clock they were running the same story in the *Post and Mail*. Apart from a new headline, "Horrid Starvation in Serbia," the story copied the one in the *Daily News* word for word, including the mayor's formulaic confession of helplessness.

Stone had no avenue of legal redress. Common law copyright disappeared upon publication, and to enjoy federal copyright protection one needed to deposit a copy with the Registrar of Copyrights before publication. A daily newspaper in Chicago had no way of doing this. If Stone wanted to prevent the McMullens from copying the news, he had to take matters into his own hands. The McMullens soon discovered that self-help was a time-honored and often effective weapon. As it happened, the mayor of Sovik did not utter the ominous words, "*Er us siht la Etsll iws nel lum cmeht.*" Nor did any other Serbian official. The pronouncement is not even in Serbian, but rather in English—backward. The mayor is saying, "The McMullens will steal this sure."

Stone made up the story out of whole cloth in the expectation that the McMullens would steal it from him and, once exposed, become laughingstocks. He was right on both counts. However much the public might tolerate pirates, it had no fondness for ones so gullible. The McMullens' paper lost circulation and ceased publication within two years. Stone purchased the assets in a liquidation sale. These included a membership in AP, and thus began an affiliation that was to last for more than four decades.

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<sup>2</sup> See Melville E. Stone, *Fifty Years a Journalist* 63 (Doubleday, Page & Co. 1921).

When Stone became a member of AP, it was little more than a diverse set of regional newspapers willing to share the information each gathered. The impetus behind the organization is easy to understand. If two nearby towns have separate newspapers, residents will read only their own town's paper, but they still have some interest in what happens elsewhere. Readers are better served when papers share news with one another. The only additional cost is that of transmitting the news from one town to the next.

The benefits become greater when a number of newspapers in a region join. News coverage expands. Soon people expect regional as well as local news, and newspapers must belong to the service to remain competitive. The network becomes larger, and the quality of the information improves still more. But a way must be found to prevent a paying member from entering into side deals with nonmember papers that want access to the same news on the cheap. The news organization must lay down rules. At this point, however, the agreement can also facilitate collusion. Take, for example, a provision that prevents any member from using the news service for any new paper they begin in a town already served by an existing member. Such a provision is only a step short (if that) of an explicit agreement in which all the papers agree to stay out of one another's markets.

AP took shape in such a fashion during the second half of the nineteenth century. Limiting membership and reserving the right to expel those who violated the rules were essential to its success. AP's contracts committed the newspapers to sharing their local news only with AP. Moreover, members enjoyed "franchise rights" that enabled them to blackball any new paper from becoming a member of AP within a given circulation area of the member's own paper.

As national news became increasingly important, the principal advantage of belonging to AP lay in the economies of scale that existed in transmitting infor-

mation across long distances. Getting information from New York to a small town in the Midwest required a large network of telegraph wires and many telegraph operators. Each dispatch had to be retransmitted as it went from one node on the network to another. Maintaining this infrastructure—leasing the telegraph lines and hiring telegraph operators—was expensive. This was AP's principal activity, not the gathering of information. Once such a network was created, there was no need for a second network. For this reason, AP fit the classic definition of a natural monopolist.<sup>3</sup>

Melville Stone became the head of AP in the early 1890s. At this time, the infrastructure was well established, but AP had nearly collapsed in the wake of massive cheating by some members. What it needed most was someone to police its members more effectively. Stone was the obvious choice. He was not much of a businessperson, but his convictions aligned perfectly with AP's self-interest. These included a hatred of pirates and a conviction that AP's by-laws, far from being anticompetitive, were founded on high principle.

Stone had an appetite for agreements that had the effect of preserving the competitive edge that AP papers enjoyed in the marketplace. Shortly after becoming the head of AP, Stone entered into an agreement with Reuters and other European news services in which AP acquired exclusive access to their news. This agreement gave AP a lead over any rivals in publishing foreign news, one that persisted for decades. The close affiliation between these foreign news services and the governments of their respective home countries also ensured that AP had exclusive access to government communiqués.

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<sup>3</sup> See Kenneth E. Train, *Optimal Regulation: The Economic Theory of Natural Monopoly 1* (MIT Press 1991) (“a natural monopoly exists when the costs of production are such that it is less expensive for market demand to be met with one firm than with more than one”).

Among his contemporaries, Stone was the person most associated with the idea that the law should protect news as property.<sup>4</sup> Moreover, Stone did not limit his preaching to fellow journalists. Those in his social circle with any connection to law were subjected to lengthy lectures on Maine, Blackstone, Roman law, and rights in property.<sup>5</sup> The nature of the property in news that Stone wanted was distinctly tied to the characteristics of a wire service at the time. The story Stone fabricated to fool the McCullens underscores this point. In it, Stone’s own paper is paraphrasing the *London Times*. Stone could have easily claimed to have a correspondent in Serbia (as opposed to one in London who merely read the newspapers there), yet it never occurred to him to do this. For Stone in 1876, copying from the *London Times* was entirely unobjectionable.

Stone took the same view when it came to actual controversies. During the Boer War, Stone had AP’s London correspondent buy the *London Times*, copy its war news, and then cable it back to this country. The *Chicago Tribune*, which had paid the *London Times* for the exclusive right to carry its war news in the United States, sued on the ground that such copying was theft. Stone and AP took the opposite view and prevailed.<sup>6</sup>

Stone saw no inconsistency. In 1900, the heavy lifting in reporting distant events came from the cost of transporting information. Indeed, this is what made a wire service a natural monopoly. AP was primarily a transportation system, a

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<sup>4</sup> Among Stone’s papers, for example, is a letter from a fellow journalist in 1883:

I am anxious and curious to know how you are progressing with your plans to test ownership in news. It is growing more and more important.

See Stone, *supra* note 2, at 358.

<sup>5</sup> See *id.* at 355–59.

<sup>6</sup> See *Tribune Co. v. Associated Press*, 116 F. 126, 127 (C.C.N.D. Ill. 1900). The court found that this controversy between “the rights of the Tribune Company to the fruits of its enterprise and expenditure under its contract arrangement with the Times, and, on the other hand, the rights of the public to the news matter thus published in the leading English newspaper” ultimately turned on copyright law. The case does not discuss misappropriation as an independent theory.

network of wires and telegraph operators. It spent little time or effort in gathering information. The value of what it put into the wires was trivial compared to its value when it came out thousands of miles away. The “news” that came over AP wires during this period was a stream of raw facts and figures for local editors to shape into stories. It consisted of facts about shipping, markets, and sporting events, congressional reports, and whatever bits of ordinary information that found their way to the telegrapher.<sup>7</sup> Telegraph operators had little education. Their skill lay in quickly transmitting large amounts of information in a highly compressed form.

If one were in Washington, D.C., there was no magic in learning the outcome of a Supreme Court case. It was not important that the telegraph operator in Washington read about the decision in a local newspaper or learned about it by some other means. The trick was transmitting the information at low cost. A typical AP cable of the time read this way:

t scetus tdy dodd 5 pw f potus dz n xtd to t pips, ogt all pst cgsl xgn q sj is uxl.

The operator receiving the cable unpacked it and it became this:

The Supreme Court of the United States today decided that the power of the President of the United States does not extend to the Philippines, on the ground that all past Congressional legislation on the subject is unconstitutional.<sup>8</sup>

The editor then took this story and expanded it further, drawing on existing information (such as the name of the case, the facts behind it, and likely fallout from the decision). When published, the story did not carry any attribution to AP and might look entirely different from the dispatch itself or from a story in another paper that used the same cable. The value of the information lay entirely in its transmission across great distances.

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<sup>7</sup> See Stone, *supra* note 2, at 210.

<sup>8</sup> See Stone, *supra* note 2, at 237–38.

This notion was reinforced in *National Telegraph News Company v. Western Union Telegraph Company*, another case from the Seventh Circuit decided at about the same time as Stone's dispute with the *Chicago Tribune*.<sup>9</sup> One of the great technological marvels of the late nineteenth century was the telegraph ticker. It converted a telegraph signal into printed letters on long, narrow paper tapes. These "ticker tapes" made stock quotes available to brokers and banks. As the cost of telegraphy fell, tickers became more widespread. By 1900, hotels and saloons, for a modest monthly fee, leased tickers from Western Union so that patrons could learn baseball scores and racing results from other cities in close to real time. Western Union, however, soon faced a problem similar to the one Stone had with the McMullens. A company that distributed news only in Chicago bribed someone to gain access to a ticker and thereby acquired on the cheap whatever information Western Union brought to the city.

When Western Union brought an action to stop the practice, it had the good fortune to appear before Circuit Judge Peter Grosscup. Grosscup recognized the need for an injunction that prevented third parties from gaining unauthorized access to the information. To be sure, the immediate business of Western Union, one that catered to gamblers and grain speculators, did "not arouse any great solicitude," but this service was merely a manifestation of a great technological change, one that allowed events across the world to come, "almost instantly, into the consciousness of mankind." By this technological achievement, "the world [was] made to face itself unceasingly in the glass."<sup>10</sup> But all this was possible only if those who provided the service could enjoy a large enough return to justify

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<sup>9</sup> 119 F. 294 (7th Cir. 1902).

<sup>10</sup> *Id.* at 300.

their investment. The matter before Judge Grosscup could be reduced to a simple, almost rhetorical question:

Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite . . . ?<sup>11</sup>

Judge Grosscup saw that Western Union was no different from a news service such as AP. Information—be it a sports score or an account of starvation in a foreign country—is itself free for anyone to gather. No one can claim an ownership interest in it at the source. But the news can be conveyed quickly across great distances only if a large infrastructure is in place. No one will build and maintain this infrastructure if the information cannot be protected at the other end. Western Union had a right to enjoin people who sought unauthorized access to the information sent out over its lines. Other courts, including the Supreme Court, were quick to follow Judge Grosscup.<sup>12</sup>

Peter Grosscup saw things in much the same way as Melville Stone. This was no accident. Grosscup and Stone were neighbors. Long before the litigation, Grosscup had endured long winter evenings in which Stone lectured him on how property rights in the news ought to be recognized, and they continued to talk about the idea while the Western Union case was being litigated.<sup>13</sup>

In Stone's view, however, Judge Grosscup's opinion did not go far enough. It did not explicitly recognize a property right in news. An analogy helps to explain what Stone had in mind. Suppose a town is many miles from a large lake. The

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<sup>11</sup> *Id.* at 300–301.

<sup>12</sup> The Supreme Court adopted his position in *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 250–51 (1905):

The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach.

<sup>13</sup> See Stone, *supra* note 2, at 359–60.

water in the lake is inexhaustible and free for anyone to take. An entrepreneur builds an aqueduct to bring water to the distant town and then sells it to the local residents. Water is protected once it is put into the aqueduct. If others tap into the aqueduct or bribe residents to redirect water intended for their own personal use to others, the entrepreneur can bring a conversion action. The stream of quotidian facts that coursed through AP's wires should be treated the same way.

While he lauded the result in cases such as *National Telegraph*, Stone wanted courts to do more than fit the cause of action awkwardly into the pigeonhole of tortious interference. Courts should treat information sent over a telegraph network as they would treat water sent through an aqueduct. Both should become the property of the person that transported them.

Stone did not understand the conflict between his notion of a property right in news and his belief that it was perfectly appropriate for AP to relay stories carried in London newspapers. This tension grew greater as the cost of transmitting information declined. Returning to the analogy, Stone's idea makes sense in a world in which aqueducts are expensive and water is plentiful at the source. It is perfectly coherent to talk about recognizing a property interest in water coming out of an aqueduct but not water going in. When the cost of transporting the water declines dramatically, however, everything changes. One must protect water as property everywhere or nowhere. So too when the cost of transmitting information falls.

Innovations in telegraphy did not stop with the ticker. Thomas Edison, Elisha Gray, and the other great inventors of the nineteenth century brought a host of other improvements. It became dramatically cheaper to transport information. As the cost of transporting information fell, it became hard to distinguish between reprinting news stories that appeared in a distant city (a practice Stone

firmly thought unobjectionable) and taking stories from a local paper (a practice Stone believed morally repugnant).

Obtaining a property right in news that advanced AP's interests (or at least did not run counter to them) was tricky. Stone's quixotic and relatively unfocused belief that a court should find a property right in news would likely go nowhere without help. Fortunately, one of AP's rising stars, the man who would succeed Stone at the helm, was at hand. He understood far better than Stone the forces of technological change and how to reshape Stone's notion of a property right in news that would work to AP's advantage.

### **Kent Cooper Joins AP**

By 1910, Stone had led AP for almost two decades, and he changed nothing. Everything from the furniture in his office to the contracts he signed was trapped in the nineteenth century. By one firsthand account, "[t]he place was not even pleasantly antique—it reeked with old age."<sup>14</sup> The board of AP was becoming frustrated with Stone.<sup>15</sup> His operation was losing money, and he did nothing about it. Only when his board pushed him did Stone hire someone to reduce the cost of AP's telegraph operations, something that was still consuming 75 percent of its expenses. This man was Kent Cooper.

Stone did little to help Cooper. On one trip, Cooper found that he could lease telephone wires and telegraph stories at one-fourth the price that AP was paying Western Union. But he had no authority to enter into such transactions on his own. When he wrote Stone for permission, Stone never bothered to respond. Exasperated, Cooper closed the deal anyway, half expecting Stone to fire him.

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<sup>14</sup> See Kent Cooper, *Kent Cooper and the Associated Press: An Autobiography* 36 (Random House 1959).

<sup>15</sup> See *id.* at 46.

Stone, however, received the news of the new contract with complete indifference. When Cooper asked why his letters went unanswered, Stone merely said, “I’ve always said that a lot of things will answer themselves in three weeks if no attention is paid to them.”<sup>16</sup>

From this point onward, Cooper started taking action first and worrying about Stone’s permission later. Cooper renegotiated contracts to take account of reduced transmission costs. In the space of a year, he reduced AP’s costs by \$100,000. Cooper also replaced telegraph operators with teletypes and improved the network. In October 1916, Cooper was able to have a single operator transmit a play-by-play account of the World Series directly to 700 newspapers throughout the country. This event was a milestone. Previously, messages had to be sent and resent a number of times to reach everyone. For the first time, there was a true countrywide network, and information spread at the speed of light. As Thomas Edison told Cooper at the time, AP had given the country “a real arterial system and it is never going to harden.”<sup>17</sup>

Cooper knew that AP could not stand still. Reductions in costs for AP meant that they would decline for others as well. Rivals would replace telegraphs with teletypes too. Creating a network was becoming progressively cheaper. Providing an infrastructure for transmitting information was becoming too easy. To flourish, AP’s business model had to change.

Only a month after the 1916 World Series, Cooper orchestrated a precinct-by-precinct tally of the presidential election. With it, AP became the first to establish that Woodrow Wilson had been reelected. Collating precinct-by-precinct vote counts was qualitatively different from sending whatever information was avail-

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<sup>16</sup> See *id.* at 47.

<sup>17</sup> See *id.* at 72.

able over a network. Cooper understood that AP could assemble information and repackage it better than anyone else. Its existing network (and the various by-laws) gave it better access to domestic information, and its cartel agreement with foreign news services gave it an advantage with news from abroad. But these packages of information, once assembled and published, are easy for others to retransmit. Cases such as *National Telegraph* no longer provided sufficient protection.

To extend the reach of existing law, Cooper needed to go to court. But first he needed to find a suitable defendant. No one remotely resembling the McCullen brothers was on the scene. No one was lifting AP's stories and reproducing them wholesale. After AP carried a story, rival news services often ran ones that conveyed the same facts. But it was hard to show that they were copying rather than providing their own independent account of the same events. For example,<sup>18</sup> on December 11, 1916, AP received the following cable from its correspondent in London:

British official report intermittent enemy shelling Ancre area nothing report night.

From this, AP created the following dispatch:

Following is the official report of today from the Franco-Belgian front: "Aside from intermittent enemy shelling in the Ancre area, there was nothing to report last night."

The *New York Evening Journal*, which was not a member of AP, ran the following story some hours later:

Aside from intermittent shelling in the Ancre sector of the Somme Front, there is nothing to report, British War Office announced today.

The *Journal's* story is similar and could have been lifted from the AP dispatch, but it does not bear any telltale signs of copying. Nothing prevented the *Evening*

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<sup>18</sup> See Supporting Affidavit of Melville E. Stone, *Associated Press vs. International News Service* 28 (New York 1917) (hereinafter "Stone Affidavit").

*Journal* from insisting that it had an independent source. Among other things, the *Journal's* story had details (such as references to the Somme Front and the British War Office) not in the AP account.

Cooper did find a handful of instances in which the evidence of copying was stronger. In several cases, AP ran a story that omitted an eminent person's title or committed some other faux pas, and a rival newspaper soon carried a similar story that made the same mistake. The strongest example came when AP carried a story that mistook one person for another. One day AP sent the following story out on its wires with a Paris dateline:<sup>19</sup>

President Poincare has awarded a gold medal to Mrs. Harry Duryea of New York for her services during the last two years as head of the American Aid Committee for War Victims.

The next day the *Washington Herald*, not an AP member, ran the following story, again with a Paris dateline.

Mrs. Harry Duryea of New York was awarded a gold medal by President Poincare for her services in war relief work. Mrs. Duryea has been president of the American Aid Committee for two years. She returns to America tomorrow.

As it happened, Poincaré gave the award to New York socialite Nina Duryea, not her sister-in-law, Mrs. Harry Duryea. But even here, the case for copying is not watertight. Both papers might have been given the same misinformation from a common source. Indeed, the *Herald's* story contained a detail—Duryea's return the next day to the United States—that AP's account did not. How could the *Herald* have known about Duryea's impending departure unless it had a correspondent on the scene? How could such a correspondent know about her departure but not about the medal? And if the *Herald* had such a correspondent, why would it have copied from AP?

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<sup>19</sup> Stone Affidavit at 28–29.

Cooper did find one issue of a Georgia newspaper that copied a translation that AP made of an official French government report. The same issue had several other instances of copying of foreign government reports to which AP's agreements gave it exclusive access. But such isolated instances of copying, not of stories it wrote but of government reports, might not be sufficient to persuade a court that AP was entitled to extraordinary relief. Among other things, AP would be asking for exclusive rights to government communiqués that it acquired not through hard work but through a cartel agreement. To establish a property right in news above and beyond what already existed, Cooper needed something more than stray instances of copying of government documents. He found such a case—in Cleveland.

### **Kent Cooper Goes to Cleveland**

Late in the day on October 3, 1916, two streetcars collided on the West Third Bridge in Cleveland, killing two and injuring thirty others. The timing of the accident was particularly unfortunate for Fred Agnew, who ran the INS bureau in Cleveland. Part of his job was to report such stories to INS's main office in New York. Instead of doing his own reporting, Agnew bribed a telegraph operator who worked at the *Cleveland News* \$5 a week to keep him abreast of such stories. But this telegraph operator left work each day at 3 o'clock and was not in the office when the news of the accident came to the newsroom. As a result, Agnew missed the story and so too did every INS paper in the country.

The *Cleveland News* was bound by contract to AP and could not share its news with anyone else. Cases such as *National Telegraph* flatly prohibited Agnew from getting his news by paying off one of its employees. INS's general manager in New York was not troubled by the arrangement. Indeed, INS's central office had

known about and explicitly encouraged it for years.<sup>20</sup> But the general manager was displeased nevertheless. If bribing one employee at the Cleveland press was not enough, two should have been bribed. In his eyes, Agnew was a telegraph operator who had been overpromoted. He lacked initiative and judgment. The general manager demoted Agnew and appointed someone else to run the office.<sup>21</sup>

Agnew returned to his job as a telegraph operator embittered. He started complaining—both about the way he had been treated and the way *INS* did business. The world of telegraph operators was small, and Cooper kept close tabs on it. Agnew’s stories about *INS*’s practices in Cleveland found their way back to Cooper, and Cooper soon found himself on a train to Cleveland.<sup>22</sup> Cooper met with Agnew, and Agnew provided specific instances in which *INS*’s Cleveland bureau had taken facts from the AP wire and repeated them in its own dispatches.

Agnew also turned over to Cooper written evidence that the Cleveland office was acting with the blessing of *INS* headquarters. For example, the New York office had sent Agnew’s successor a letter containing the following passage:

Agnew had an arrangement somewhere in the Cleveland office whereby he could tip us off on big news stories that the A.P. was carrying. I wish you would find out from him just what this connection was and if you could make use of it. It proves very valuable to receive a tip what the A.P. is carrying as soon as it puts it out on the wire.<sup>23</sup>

The letter added:

Don’t mention the A.P. in any messages of that kind but simply say: “Ansonia carrying fifty dead Pennsylvania wreck Pittsburgh,” or whatever it may be.

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<sup>20</sup> See *id.* at 23.

<sup>21</sup> See Affidavit of Fred J. Wilson at 79.

<sup>22</sup> See Oliver Gramling, *AP: The Story of News* 285 (Farrar & Rinehart 1940).

<sup>23</sup> Stone Affidavit at 23.

INS copied comparatively little of the Cleveland material. More often it was interested merely in confirming facts it already had.<sup>24</sup> INS also took Cleveland material and double checked it against other sources, sometimes correcting what AP had reported.<sup>25</sup> Actual copying of material outside of Cleveland, published or otherwise, was equally modest.<sup>26</sup> INS rarely did more than take an AP bulletin that ran fifty words or fewer, paraphrase it, and then embellish it with a few details of its own, and it did not appear to do this often.

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<sup>24</sup> For example, the New York office knew from other sources that Lloyd George was about to resign as War Secretary and asked the Cleveland office whether AP was reporting that he had actually done so. See Affidavit of Fred W. Agnew at 37.

<sup>25</sup> For example, when Cleveland told New York that AP was reporting that the trawler *Narzal* was missing, reporters in New York did enough of their own work to learn that AP had misspelled the ship's name, and in their account they corrected it to read *Narval*. Affidavit of Fred W. Agnew at 35–36.

<sup>26</sup> The only other evidence of using nonpublic material involved INS's use of the AP wire of a Hearst-owned New York paper, the office of which was in the same building as INS headquarters. This evidence, however, was circumstantial and to some extent undercut by the Cleveland evidence. The New York office should not have needed to rely on people in Cleveland if it already had unfettered access to an AP wire in New York.

In the end, AP found only minor paraphrasing here and there and occasional copying of government documents to which AP had exclusive access. In its supporting affidavits, AP alleged only ten instances of misappropriation (not counting the Cleveland material):

- paraphrase of a fifty-word summary of an official statement of British officials on a Zeppelin raid;
- copy of a twenty-word quote of a captain whose boat the Germans torpedoed;
- paraphrase of the eleven-word report of shelling on the Somme Front (discussed above);
- paraphrase of the thirty-two-word account of the Duryea medal (discussed above);
- reference to the Secretary of Scotland by only his last name and reference to the Lord Chancellor for Ireland as "Ignatius J. O'Brien" rather than "Sir Ignatius J. O'Brien," after AP did the same thing;
- paraphrase of AP's translation of French press comments on a German peace proposal;
- statement of the Emperor Charles to his army and navy previously carried on AP wires;
- paraphrase of a report on the reaction of the Tokyo stock market to the German peace proposal;
- one-sentence quote from the *London Globe* contained in an extract that AP had run earlier; and
- several verbatim extracts of AP's summary of a speech made in the House of Commons.

If AP detected large-scale copying, it would not need to rely on such things as a paraphrase of an eleven-word dispatch. The four last instances of appropriation are from two issues of the *Atlanta Georgian* that ran on successive days. What is most striking is how much of the alleged appropriation is of public statements and material AP itself had taken from the foreign press. Very little is of AP's own work, as opposed to work to which cartel agreements gave it exclusive access.

Cooper, however, did not need to show much copying to bring the case. INS had overstepped the bounds by bribing reporters in Cleveland. With the Cleveland affidavits in hand, AP would invoke *National Telegraph* and demand an injunction against INS. In defending its actions, INS would claim that it had not obtained the information by bribery but had merely used AP bulletins that had already been made public. Once INS admitted to copying bulletins, AP would claim that copying public material also violated its rights. A court then would have to rule on this question as well. It would have to decide whether copying was permissible, even if there had not been much copying.

### **William Randolph Hearst Defends Himself**

The litigation in the district court consisted of a one-day hearing on a preliminary injunction. At the hearing, AP's lawyer spent several hours reviewing the Cleveland evidence, both to put INS in a bad light and to smooth the way for its principal claim. But Cleveland was a sideshow, and everyone understood this. INS's lawyer cut to the chase:

[T]his controversy comes down to the question of law, as to whether we have the right to use material that had already been published . . . and all this other matter is a pretext, ballast and evasion, and it is all put in for the purpose of being a make-weight, on which to carry the other legal propositions.<sup>27</sup>

As there was little evidence of outright copying, AP's lawyer had to rely on hypotheticals:

Suppose some man, by some modern process, could duplicate and reproduce the *Evening Post* entirely, within half or three-quarters of an hour of the time when the first copy was available. . . . Now someone . . . decides that he will establish a paper called, we will say, the *Evening Call*. He makes a business of taking the first copy of the *Evening Post* that comes out, and . . . reproduces it entire . . . and then sells that at one cent instead of three cents, in competition with the *Evening Post*.<sup>28</sup>

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<sup>27</sup> Hearing Transcript at 205.

<sup>28</sup> *Id.* at 158.

The conduct of INS employees, AP's lawyer claimed, was different only in degree, and "by these methods they have reaped where they have not sown."<sup>29</sup>

District Judge Augustus Hand was openly skeptical that the injunction should extend to published material. After all, AP did not yet require papers to identify AP as a source when it used its materials:

I don't get your point. I get the words of course that you use, but I don't see anything immoral at all, when a thing has been put out on a bulletin board, whatever the source may be, when the source is not disclosed, in one's copying it and giving it to anyone else, either as a matter of business or as a matter of pleasure.<sup>30</sup>

When AP's lawyer started talking about the realities of the news business, the judge again cut him off:

Aren't these people supposed to be getting news from any source they can, so long as they don't commit fraud or break a contract or deceive the public?<sup>31</sup>

Hand forced AP to confront a second issue as well. AP routinely monitored the bulletins of other wire services and used them as a starting point for its own stories.<sup>32</sup> AP had to explain why the use it made of the bulletins of rival services was permissible, while the use INS allegedly made was not.<sup>33</sup> Making the distinction seem sensible (as opposed to merely self-serving) was not easy. Anyone familiar with the different wire services could see that drawing a line between copying with independent confirmation and copying without greatly favored AP. Most obviously, AP's competitive advantage came in large measure from its cartel agreement with foreign news services. AP could report on a government communiqué, and other news services had no way of confirming the story. No one else had access to it. Because of the cartel agreement, the only way to learn

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<sup>29</sup> Id. at 160.

<sup>30</sup> Id. at 161.

<sup>31</sup> Id.

<sup>32</sup> Affidavit of Edward R. Sartwell at 125–26.

<sup>33</sup> Affidavit of Kent Cooper at 261–63.

about the report was by reading about it in a paper that belonged to AP. The problem did not run the other way. Other wire services did not belong to any cartels or otherwise publish information to which they alone had access.

Moreover, it was much easier for AP to confirm facts. AP's membership agreements required newspapers to share their news with AP and with no one else. A paper such as the *Cleveland News* itself subscribed to both INS and AP,<sup>34</sup> but AP's by-laws ensured that the two services did not stand on equal footing. AP could count on reporters at the *Cleveland News* to confirm stories that INS carried, while INS could not use the same reporters to confirm AP stories.

In addition, a legal rule that required double-checking merely required AP to do what it was already doing. AP occupied a market niche in which it emphasized the accuracy of its news. AP made much of the fact that a rumor of the death of a pope or the end of a war did not become credible until it was carried on the AP wire.<sup>35</sup> By contrast, rival news services catered to a clientele that was not so punctilious. Their subscribers cared less about accuracy, and hence they did not engage in much double-checking of any of their sources. A legal rule requiring wire services to confirm facts would impose new burdens on them but not on AP.

In short, AP had exclusive access to more information, a greater ability to check facts, and greater reason to do so in the absence of a legal rule. The distinction between using tips and copying was hardly a neutral one that affected everyone equally. Hand found the distinction unpersuasive for a different reason. The idea that confirmation privileged copying could not be reconciled with the

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<sup>34</sup> See Affidavit of E. A. Smiley at 96.

<sup>35</sup> A rival wire service prematurely reported the end of World War I. When the armistice was actually signed a few days later, a hagiographic history of AP recounts, people were not satisfied even with a statement from the State Department. What mattered was whether AP carried the story. See Gramling, *supra* note 22, at 283.

principle AP was trying to establish. Using bulletins as leads and copying them directly were both inconsistent with treating news as property:

[T]he only way to afford full protection to the news gatherer is to prevent the use of news by a rival, either in the form of tips, or otherwise, for a sufficient time to enable the daily newspapers throughout the country to receive and publish the news.

In addition, the idea of confirming facts was inherently wasteful. As Hand put it, “[t]here is something rather grotesque in going through the form of verifying a tip, no matter how authentic it may be.”<sup>36</sup>

INS, however, failed to convince Hand that the idea of a property right in news was fundamentally unsound. Nor did he understand that AP and INS occupied fundamentally different places in the market. Hand believed that since an injunction would apply to both AP and INS,<sup>37</sup> the problem of crafting one that applied evenhandedly was one that the parties could resolve.

Hand shared AP’s suspicion that more copying was going on than it could prove. The Cleveland evidence put INS in a bad light, and INS was already held in low repute. Most INS subscribers were newspapers that, like INS itself, were owned by William Randolph Hearst. Hearst’s papers were tabloids filled with sensational headlines, human-interest stories, and Hearst’s own idiosyncratic view of the world.<sup>38</sup> One would expect him to copy without compunction if he needed to, and it appeared he did.

The British and the French governments had banned INS from sending cables from their countries. If INS could not use AP bulletins, it seemed it had no way

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<sup>36</sup> See *Associated Press v. International News Service*, 240 F. 983, 991, 992 (S.D.N.Y. 1917).

<sup>37</sup> AP’s lawyer conceded this point in the hearing in the district court. See Hearing Transcript at 197–98.

<sup>38</sup> For an account of how Hearst advanced his own, decidedly anti-establishment, view of World War I in his papers, see W.A. Swanberg, *Citizen Hearst: A Biography of William Randolph Hearst* 301–06 (Charles Scribner’s Sons 1961).

to provide war news. In the end, Hand was willing to believe that there had been substantial copying, and he refrained from granting a property right in news only because he thought the responsibility for establishing a new doctrine belonged to the court of appeals.

For the appeal, AP brought on a new lawyer, one whose credentials regarding common law intellectual property were impeccable. He was Peter Grosscup, the former judge and longtime friend of Stone's who had handed down the decision in *National Telegraph*.<sup>39</sup> He continued to make the same argument. INS should not be able to reap what AP had sown. By the time the case reached the court of appeals, the Cleveland issue disappeared. INS had no interest in litigating a question when the law was clear and the facts cast it in a bad light. All that was left was an abstract question about news as property, not connected to particular facts or indeed much contested by opposing counsel.

INS could have advanced a number of arguments in its defense. It might have been expected to argue that recognizing a property right in news would limit what people learned about the war raging in Europe. Those living in cities that lacked an AP paper would be left in the dark, given the bans imposed on INS. INS chose not to make this argument and with some reason. It was hard for INS to argue copying war news was justified without appearing to admit that it had done so. Hearst refused to admit either that INS copied or that British and French censors affected INS's ability to report on the war. Even if pointing to censorship would enhance INS's chance of winning (and it is not obvious it would<sup>40</sup>), Hearst

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<sup>39</sup> When the case reached the Supreme Court, Frederick Lehmann joined the AP team. Lehmann served as Solicitor General under William Howard Taft.

<sup>40</sup> Complaining about British and French censors might have done little good. INS's activities in Cleveland showed that it took advantage of AP for both domestic and foreign news and had been doing long before the British and French bans. Moreover, the bans would not have gained INS much sympathy, as they arose from INS's entirely casual commitment to accurate reporting.

did not care much about the outcome of the case. Losing the case would have a trivial impact on INS's operations. Against a man utterly without scruples (such as Hearst), an injunction prevents only copying that can be proven, and, as the record in the case makes plain, AP could prove little.

Hearst did not engage in word-for-word copying from AP in the style of the McCullens. He was quite content to take the essential facts of an AP story and make up the rest. Many of INS's overseas correspondents were and had always been fictitious. Their reporting could continue unimpeded no matter what the British and the French did.<sup>41</sup> In such an environment, Hearst needed only to refrain from outright bribery (or do more to ensure the loyalty of those doing the bribing) and to avoid traps such as the one the McCullens fell into.<sup>42</sup> In any event, INS's need for a source of war news had disappeared by the time the case came to the Supreme Court, as the censorship ban had been lifted well before then.

INS's lawyer still might have focused on the anticompetitive features of AP's operations. He could have attacked both the by-laws that protected the markets

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One story that purported to come from London described a Zeppelin raid with the headline, "London in Flames." The details that gave the story its power (especially the headline) did not come from London at all, but were invented in New York. An account of the battle of Jutland began, "The British Admiralty to-night admits an overwhelming defeat by a portion of the German High Sea Fleet in the first great naval engagement of the war." The British Admiralty never admitted to an overwhelming defeat or indeed a defeat of any kind. Compounding the problem, to publish such a story with a London dateline falsely implied the seal of approval from British censors.

<sup>41</sup> See Oliver Carlson & Ernest Sutherland Bates, *Hearst: Lord of San Simeon* 186 (Viking Press 1936).

<sup>42</sup> In this, Hearst was not entirely successful. After AP brought its case, another news service ran a story from Russia about "Foreign Undersecretary Nelotsky," and several INS newspapers ran a story with a London byline covering the same facts and referring explicitly to Nelotsky's involvement. See "United Press Explains the Identity of Secretary Nelotsky," *New York Times*, January 25, 1918, at 3. As the *New York Times* eagerly pointed out, no Russian minister existed whose name was "stolen" spelled backwards, with a "ky" added for Russian flavor.

of individual AP members<sup>43</sup> and AP's cartel agreement with foreign news services. INS could have maintained that the "franchise rights" were an illegal restraint of trade in violation of the antitrust laws. Even if they were not, INS could have argued that a wire service was like a common carrier obliged to accommodate all comers. Hence, a court of equity should not protect a news service that refused to provide its news to papers willing to pay for it. Similarly, INS could have argued that a court of equity should not step in to prevent one wire service from copying official government documents—especially when the party asking for the injunction had acquired the documents in question through a cartel agreement. But INS's lawyer did none of these things.

It was not that INS's lawyer was blind to such issues. To the contrary, his special expertise was in antitrust.<sup>44</sup> He declined to make such arguments because he was following the wishes of his client. William Randolph Hearst was the most important member of AP. He owned more newspapers than any other member of AP and contributed millions to its coffers. Hearst had long lived in the strange world in which he could use AP's wire service for only some of his papers. Hearst recognized the value of his own franchise rights. He had no interest in an outcome that undercut his own ability to prevent rival newspapers from competing with his AP papers.<sup>45</sup> He had no desire for a legal rule that would force AP to sell its news to anyone willing to pay for it.<sup>46</sup>

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<sup>43</sup> When the anticompetitive nature of the by-laws was ultimately presented to the Supreme Court, it struck them down. See *Associated Press v. United States*, 326 U.S. 1 (1945).

<sup>44</sup> INS's lawyer, Samuel Untermyer, was one of the leading lawyers of his time. He gained fame as the lawyer for the Pujo Committee's investigation of the money trusts. His brilliant cross-examination of J. P. Morgan made headlines and led both to the creation of the Federal Reserve and to the Clayton Antitrust Act.

<sup>45</sup> See Cooper, *supra* note 14, at 198–99.

<sup>46</sup> Indeed, during this period, Hearst fought inside AP to maintain franchise rights while Kent Cooper wanted to limit them. See *id.* at 74–75, 198–99.

Because Hearst did not care much about the principle that AP was advancing, he had little reason to have his lawyer question its soundness or scope, especially as doing so would call into question AP practices that inured to his benefit. On appeal, as before the district court, INS's lawyer did nothing to test the limits of such a principle or shape its contours.

The court of appeals took the step that Augustus Hand did not to take on his own. It concluded that AP was entitled to "an injunction against any bodily taking of the words or substance of [its] news."<sup>47</sup> The court did so without recognizing that nothing in the record showed INS had in fact engaged in the "bodily taking" of AP stories.<sup>48</sup> On appeal, the property right in news that AP sought was completely abstracted from the facts.

In the Supreme Court, Justice Pitney assumed that AP and INS were two competitors doing business in much the same way on a more or less level playing field. He then confused hypotheticals about copying news on the East Coast and publishing on the West with facts of the actual case:

[T]he 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 [the INS] to take complainant's news from bulletin or early editions of [AP]'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 [AP].<sup>49</sup>

Justice Pitney immediately adopted exactly the principle that Cooper wanted without any effort to qualify it:

[INS], by its very act, admits that it is taking material that has been acquired by

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<sup>47</sup> *Associated Press v. International News Service*, 245 F. 244, 253 (2d Cir. 1917).

<sup>48</sup> Stone and Cooper seem to have thought that the censorship ban effectively prevented INS from getting any news from abroad. From this, they thought that one could infer that any news INS published was likely taken from AP or some other wire service. But some war news came from elsewhere, and, given INS's penchant for embellishment and outright fabrication, one could not infer copying merely from that fact that INS continued to report on the war.

<sup>49</sup> *International News Service v. Associated Press*, 248 U.S. 215, 238 (1918).

[AP] as the result of organization and the expenditure of labor, skill, and money, and which is salable by [AP] for money, and [INS] in appropriating it and selling it as its own is endeavoring to reap where it has not sown. . . .<sup>50</sup>

News services were entitled to the fruits of their own labors, and others therefore could not appropriate their work. Justice Pitney dismissed *INS*'s argument that *AP*'s use of *INS*'s wire service for tips gave it unclean hands. He was oblivious to the ways in which the distinction between using tips and copying favored *AP*.

Justice Brandeis dissented, largely on the ground that judges are ill equipped to resolve such disputes. His instincts served him well. He may not have recognized what was going on, but at least he knew not to enter deep waters he did not understand.<sup>51</sup> He recognized that some limits needed to be put on Justice Pitney's new principle.

After the decision, *AP* and *INS* soon settled. This was to be expected. Each party had much to lose if the relationship fell apart. Hearst wanted the benefits of *AP* service wherever he could get them. For their part, other *AP* members had no wish to exclude him or for him to leave the fold.<sup>52</sup> As much as they disliked him, they were too dependent on his financial support. Genuine disputes between *AP* and Hearst had to be resolved outside the courtroom.<sup>53</sup>

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<sup>50</sup> *Id.* at 239.

<sup>51</sup> Justice Brandeis' take on the relationship between competition and exclusive rights is further explored in the Story on *Kellogg Co. v. National Biscuit Co.*

<sup>52</sup> Only one director said as much publicly. See Ferdinand Luchberg, *Imperial Hearst: A Social Biography* 209 (Equinox Cooperative Press 1936). Oswald Garrison Villard, the publisher of the *Evening Post*, complained that "the Board of Directors lacked either the moral or business courage to rid their service of the Hearst connection." As he put it,

[I]t certainly seems incomprehensible that the Associated Press should have permitted a man to remain a member who had struck at its very integrity and had not hesitated at the use of any means to gain his end. It is the simple truth that a small newspaper doing these things would have been expelled; the Associated Press was afraid of Mr. Hearst's power, and the growing number of news papers brought into his chain of dailies.

See Oswald Garrison Villard, *The Press Today* 13–14 (The Nation 1930).

<sup>53</sup> When *AP* decided several years later to control Hearst's copying, it relied on private negotiation rather than litigation. Potentially anticompetitive practices could be kept out of the spotlight and the remedy could be crafted to ensure Hearst's compliance. In this deal, Hearst, rather

In their settlement, AP and INS agreed that neither would engage in “bodily taking” the words or substance of the other’s wire services. If Kent Cooper had brought the litigation on the assumption that such an injunction would change INS’s practices, he would have been terribly naive. Because AP had not been able to prove INS had engaged in such activities, an injunction had little effect on the way INS did business. Cooper was many things, but he was not naive.

Cooper understood that the victory had little to do with INS and everything to do with his vision of AP’s future. The case reversed the outcome of cases such as *Tribune Co. v. Associated Press*, which blessed AP’s earlier practice of copying news first published elsewhere. Nevertheless, the doctrine was completely consistent with a future in which AP spent fewer resources on transporting information and more on fashioning it in the first instance.

Immediately after the case was decided, AP required that member newspapers tag each of the reports they ran with either the words “Associated Press” or the symbol “AP.” Cooper also used the opinion to justify a legend all member papers were required to run in every issue:

The Associated Press is entitled exclusively to the use for republication of all news dispatches credited to it or not otherwise credited in this newspaper and all the local news published herein. Rights of republication of all other matter herein are also reserved.<sup>54</sup>

Under Cooper’s leadership, AP introduced feature stories and allowed the names of its reporters to appear in the bylines. Its reports became less dry ac-

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than promising not to copy published AP reports, agreed to limit the distribution of Universal Service, the morning news division of INS, only to papers that Hearst owned. Universal Service sent its wires close to the time that most of AP’s papers were published, and hence it was the entity most likely to take its facts from the AP wire. The solution worked for all concerned. Hearst distributed the morning news to the papers he cared most about (his own), and AP found a way to limit the use of its own material in a way that it could police. See Lunchberg, *supra* note 52, at 209.

<sup>54</sup> See Cooper, *supra* note 14, at 198.

counts of facts and government reports that local editors could embellish and more news accounts with bylines that included local color. This change did not meet with universal approval. As one former AP board member complained:

Mr. Kent Cooper . . . represents an entirely new school from that of Melville E. Stone . . . He has broken with tradition after tradition of the service—comic strips are his latest venture. So the Associated Press has long since abandoned its original conception of being a service devoted exclusively to the gathering of news . . .<sup>55</sup>

The decision in *INS v. AP* allowed AP to make claims of ownership when the occasion demanded. Because of this decision, AP was able to sell its service to radio stations—and pursue vigorously radio stations that used its news without its permission.<sup>56</sup> But one should not overstate the importance of the case. AP usually turned to the legal doctrine only after more familiar and more distinctly anticompetitive tactics failed. In the case of radio, for example, AP tried to form a cartel with large radio stations and other news services (including *INS*) to impose strong limits on the news that radio stations could transmit.<sup>57</sup>

### The Reception of *INS*

Justice Pitney's opinion lacked the essential quality that justifies common law adjudication. Its reasoning was entirely ungrounded. Instead of resolving an actual dispute between two opposing litigants, it merely gave an abstract pro-

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<sup>55</sup> See Villard, *supra* note 52, at 22.

<sup>56</sup> See, e.g., *Associated Press v. KVOS, Inc.*, 80 F.2d 575 (9th Cir. 1935), *rev'd* on jurisdictional grounds, 299 U.S. 269 (1936).

<sup>57</sup> At the outset, newspapers welcomed radio and raised no objections when stations repeated items in newspapers. See Erik Barnouw, *A Tower in Babel: A History of Broadcasting in the United States, Volume I, to 1933*, at 138 (Oxford University Press 1966). Their own circulations increased because fans of radio relied on the broadcast schedules in their local newspapers. By 1933, the value of the radio market for radio news was too large to ignore. AP, *INS*, and United Press banded together and negotiated a deal with network broadcasters that would, among other things, prevent radio from using news less than twelve hours old. This cartel, the Press-Radio Bureau, however, had the predictable consequence of encouraging stations to start their own independent news services and fell apart. See Erik Barnouw, *The Golden Web: A History of Broadcasting in the United States, Volume II, to 1933–1953*, at 20–22 (Oxford University Press 1968).

nouncement of a grand principle that has no obvious boundaries. The justice overlooked problems—in particular AP’s various anticompetitive practices—that complicated the application of the principle in the case before him. If forced to consider that AP shared features with other natural monopolies, such as a telephone network, Justice Pitney would likely have considered alternative approaches, such as one that would have conditioned AP’s right to prevent unauthorized copying on its willingness to sell its news to any paper willing to pay for it. Solving these problems is hard, but had the natural monopoly, the cartel, and the anticompetitive provisions of the by-laws been recognized, Justice Pitney would not have been able to stop with the observation that a wire service was entitled to prevent others from reaping what it had sown.

Nor is the principle Justice Pitney sets out of much use in environments in which the intellectual property questions can be treated in isolation. If the issue had been contested, he would likely have realized that the principle he was advancing needed to have discernible boundaries. News and indeed other forms of intellectual property generate benefits far beyond what the persons who brought them into being can or should be entitled to enjoy. We want to recognize the right of the creator to some reward, if only to ensure that others have the incentive to gather news in the future. But the right must be limited. As Benjamin Kaplan famously observed, “if 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 not entirely an illusion, depends on generous indulgence of copying.”<sup>58</sup>

Had Justice Pitney faced litigants who cared about the outcome of the case in an environment stripped of all but questions of intellectual property, he might,

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<sup>58</sup> Benjamin Kaplan, *An Unhurried View of Copyright 2* (Columbia University Press 1966).

as Richard Epstein has shown, have drawn upon customs or common practices to draw limits on the right he was recognizing.<sup>59</sup> But he neither did this nor suggested it was even appropriate. Because they set precedent that lower courts are obliged to follow, Supreme Court cases that put forward such unbounded propositions are nightmares. A succession of cases in the Second Circuit illustrates the problems that arise.

Cheney Bros. made silk cloth and each season developed a number of new patterns. Only one in five proved successful, but the profit made from the one successful pattern each year outweighed the losses from the four that failed, or at least until competitors such as Doris Silk came along. Once Doris discovered which patterns caught the public's fancy, it would copy the pattern and rush it into production. Neither having to pay to come up with a design nor having to bear the cost of producing unsuccessful ones, Doris was able to undercut Cheney.<sup>60</sup>

Learned Hand's instincts told him that Cheney must lose as a matter of first principle. But *INS*, unqualified as it was, seemed to compel a decision in Cheney's favor. As Hand confided to the other members of the panel, "the *Associated Press Case* is somewhat of a stumbling block." It did not make sense to him:

I do not believe that the five justices who united in Pitney, J's opinion meant to lay down a general rule that a man is entitled to "property" in the form of whatever he makes with his labor and money, so as to prevent others from copying it. To do so would be to short-circuit the Patent Office and throw upon

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<sup>59</sup> Richard Epstein recasts Justice Pitney's principle using a theory of natural rights anchored in customary practice. Epstein provides the best modern rationalization of *INS*. See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 Va. L. Rev. 85 (1992).

<sup>60</sup> As in *INS v. AP* itself, common law principles of intellectual property governed. The cost of obtaining a design patent on all the patterns to protect the few that proved successful (and then only for a season) was too onerous, even if the patterns qualified for protection. Copyright law was equally unavailable. See *Cheney Bros. v. Doris Silk Corporation*, 35 F.2d 279 (2d Cir. 1929).

courts the winnowing out of all such designs that might be presented. While I agree that on principle it is hard to distinguish, and that the language applies, I cannot suppose that any principle of such far-reaching consequence was intended. It will make patent cases an exception; it will give to State courts jurisdiction over inventions; it will overthrow the practice of centuries.<sup>61</sup>

Hand concluded that *INS* had to be understood as a case that dealt with the narrow and peculiar problems of a news service. As he confided in deciding another case:

It is absurd to say a man has "property" in all the product of his brains; the law has never said that or anything like that . . . We should be making an entirely new right never known before. . . .

That ends the case . . .<sup>62</sup>

But, of course, it did not end the case.<sup>63</sup> Hand still had to contend with *INS*. He continued to insist that it had to be confined to its facts:

Probably Holmes and Brandeis were right in holding that there was no real property there, but right or wrong it was a very narrow decision; all it did was to forbid copying news for the four hours that it takes the sun to move from New York to Seattle. You can't blow that up into a doctrine that a man has power to prevent everyone from copying what he has put together with his own brains and skill.

Another judge was more direct:

In principle, this case is entirely indistinguishable from [*INS*], and we might as well admit it. But we have conquered the *News* case before; it can be done again.<sup>64</sup>

Starting with these cases in the Second Circuit, *INS v. AP* has come to be read narrowly.<sup>65</sup>

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<sup>61</sup> Memorandum from Learned Hand to Martin T. Manton & Thomas W. Swann (Oct. 8, 1929) (Learned Hand Papers, Harvard Law School Library).

<sup>62</sup> Memorandum from Learned Hand to Charles E. Clark & Robert P. Patterson (June 20, 1940) (Learned Hand Papers, Harvard Law School Library).

<sup>63</sup> The case in question was *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

<sup>64</sup> Memorandum from Charles E. Clark to Learned Hand & Robert P. Patterson (June 21, 1940), *supra* note 62.

<sup>65</sup> The doctrine of misappropriation lives on, but wherever it appears, it is read narrowly. See, e.g., *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

Intellectual property disputes, like all legal disputes, cannot be decided merely by invoking an idea as vague as the right to reap what one sows. Thanks to judges such as Learned Hand and the preemptive sweep of federal patent and copyright law, *INS* has become a doctrine that lives at the margins of intellectual property law.<sup>66</sup> There are oddball cases now and then. There was, for example, a recent dispute between the Chicago Cubs baseball team and the owners of buildings behind Wrigley Field.

For years, those who lived in these buildings took lawn chairs to their rooftops with binoculars and beer to enjoy the game. Over time, the rooftops changed from being places where the building owners and their friends watched the games to a small cottage industry. As the neighbors became more entrepreneurial, the Cubs became increasingly unhappy. When the neighbors began to install stadium seats and sell season tickets to the general public, the team sued and sought to stop them. The outcome turned on *INS*.<sup>67</sup>

But the legal doctrine is only one part of the story. To maintain its stadium and make even modest renovations, the Cubs needed to obtain variances from the city. In Chicago, obtaining such variances requires the local alderman's blessing, and aldermen pay attention to homeowners. A negotiated outcome is inevitable. The reception that *INS* might enjoy in court affects the dynamics of these negotiations, but it is only one of the many forces at work.

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<sup>66</sup> For a forceful articulation of this view, see Richard A. Posner, *Misappropriation: A Dirge*, 40 *Hous. L. Rev.* 621 (2003).

<sup>67</sup> The facts of this case were anticipated in Justice Brandeis's dissent in *INS*, in which he cites an English case involving a dog show where the court specifically addresses the rights of a person (in that case a photographer) viewing a dog show from the top of a nearby house. See 248 U.S. at 255, citing *Sports & General Press Agency, Ltd. v. "Our Dogs" Publishing Co.*, [1916] 2 K.B. 880.

A similar account can be given of a recent matter involving AP itself. An agreement among college football teams selects (in ways that are often controversial) what are supposed to be the best teams to compete against each other in bowl games. AP asserted that it had the right to prevent the use of its own ranking of college football teams in the selection process. One may doubt that *INS* grants AP rights that extend so far. Nevertheless, property-rights talk added strength to AP's claim, and the bowl organizers immediately acquiesced.

Principles that emerge from a case that is not moored to an actual dispute between two genuine adversaries are suspect. Ironically, *INS v. AP* may have earned its central place in the law school curriculum because of its failings rather than in spite of them. If Justice Pitney had grasped the anticompetitive features of AP's structure or sensed how the market for news was in transition, he would have resisted the impulse toward vague abstraction, but the controversy would become more time-bound and much more complicated. Most cases arise from the facts and circumstances of a particular time and place. They usually cross subject matter areas. Intellectual property, industrial regulation, and antitrust issues arise simultaneously. These do not end up in casebooks. The iconic cases tend to have easy facts and straightforward principles. We need to worry more that they seem to have these desirable traits only because the judges are in the dark. In law, as in life, matters are rarely as simple as they appear.

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