

AMELIORATIVE INFRINGEMENT AND PUBLIC INTEREST DAMAGES

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ABSTRACT

Examining the field of trademark law, this article contemplates the potential commercial benefits of infringement—to the holder of the infringed-on mark. Infringement may benefit some infringed-on brands by (i) increasing exposure to those already interested in such products; (ii) positioning the infringed-on brand as the “authentic” or “original” type of a certain product—thereby allowing the infringed-on product to be seen as an aspirational brand, and even command a higher price point; and (iii) broadening the appeal of a type of product such that it becomes mainstream enough to crowd in additional consumers who wouldn’t have considered buying the company’s product in the first place.

Trademark law should recognize these possible benefits of infringement. A roadmap for legal recognition exists in a parallel property law concept: the writ of waste. For centuries, the doctrine of waste allowed those who made changes to property they didn’t own to be sued by owners for damages, regardless of whether the change decreased—or increased—the value of the property. But over time, courts shifted from this rigid approach and began to recognize that acts of waste which increase the value of the underlying property should, in some circumstances, be permitted. The majority of jurisdictions now accept this view of ameliorative waste. Similarly, courts should begin to recognize the possible commercial benefits to the holder of an infringed-on mark: ameliorative infringement.

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But recognizing the potential benefits of infringement does not say how these benefits should be accounted for when remedies are assessed. In some contract and tort cases, wrongdoers bestow benefits on those they wrong. The wrongdoers' conduct in these cases can be segmented into harm-causing and benefit-giving actions and accounted for accordingly. But this segmentation is not possible in similar property cases, because even wrongdoers' benefit-bestowing actions violate property owners' right to exclude. Therefore, allowing infringers to reduce the damages they owe because of the benefits they bestow would be inequitable. On the other hand, awards to plaintiffs that do not recognize these beneficial effects constitute windfalls, which are statutorily proscribed and violate the longstanding principle of only levying over-compensatory damages against especially bad actors.

As a solution to this issue, the article proposes the novel concept of awarding public interest damages. The value of the benefits bestowed on plaintiffs should be paid in full by defendants, but awarded to non-profits or other similar organizations that have a mission of helping small businesses protect their intellectual property rights. What's more, the statute governing damages in trademark cases gives judges broad, equitable discretion and would support such awards.

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INTRODUCTION: *FANG V. FABLE*

In 2013, Emma McIlroy and Julia Parsely quit their lucrative jobs at Nike to co-found Wildfang, a women’s apparel brand based in Portland, Oregon.¹ In stark contrast to Nike’s mainstream appeal, McIlroy and Parsely’s niche clothing line focused on masculine-inspired pieces tailored for women,

1. Casey Parks, *Former Nike Employees Create ‘Wildfang,’ Online Tomboy Clothing Store*, THE OREGONIAN/OREGONLIVE (Mar. 13, 2013, 1:00 PM), https://www.oregonlive.com/portland/2013/03/former_nike_employees_create_w.html [https://perma.cc/E4EH-CG76]; Matthew Kish & Mark Reilly, *Wildfang Sues Target over Its ‘Wild Fable’ Line*, MINNEAPOLIS/ST. PAUL BUS. J. (Feb. 6, 2020), <https://www.bizjournals.com/twincities/news/2020/02/06/wildfang-sues-target-over-its-wild-fable-line.html> [https://perma.cc/43N2-RMT7].

including blazers, button downs, and shoes.² Wildfang also put politics front and center, giving hundreds of thousands of dollars to the ACLU, Planned Parenthood, and LGBTQ+ rights organizations and selling various graphic t-shirts with messages such as “wild feminist.”³

These brand choices could not have come at a better time, as three trends converged simultaneously. Consumer preferences shifted toward smaller, more “authentic” brands; politics became more important to many people; and fashion from runways to off-the-rack retailers trended toward androgynous and gender-neutral styles.⁴ By 2018, Wildfang’s compound annual growth rate was 80%.⁵

Success invited imitators. That same year, Target launched a new private-label apparel brand that sought to appeal to a similar clientele of fashion-forward female customers.⁶ Like Wildfang, the logo for Target’s new line consisted of simple, outlined black text superimposed over a solid white background. The name: Wild Fable.⁷



Wildfang sued, alleging trademark infringement and related unfair competition claims.⁸ As discovery unfolded, there was some evidence of consumer confusion between the two brands.⁹ But what also became clear was that Target’s Wild Fable label had led some consumers to Wildfang

2. Tess Riski, *Portland Clothing Company Wildfang Sues Target’s “Wild Fable” Line for Trademark Infringement*, WILLAMETTE WEEK (Feb. 6, 2020, 2:25 PM), <https://www.wweek.com/news/courts/2020/02/06/portland-clothing-company-wildfang-sues-targets-wild-fable-line-for-trademark-infringement/> [https://perma.cc/6BU7-2R47]; Malia Spencer, *Activist Brand Wildfang: Loud, Fearless and Not Backing Down on Women’s Rights*, PORTLAND BUS. J. (Apr. 10, 2018, 8:35 AM), <https://www.bizjournals.com/portland/news/2018/04/05/activist-brand-wildfang-loud-fearless-and-not.html> [https://perma.cc/9LCW-LGBL].

3. Spencer, *supra* note 2; Macaela MacKenzie, *How to Build a Feminist Empire, According to the Founder of Wildfang*, FORBES (Mar. 29, 2018, 11:10 AM), <https://www.forbes.com/sites/macaelamackenzie/2018/03/29/how-to-build-a-feminist-empire-according-to-the-founder-of-wildfang/?sh=7ec3aa6756ec> [https://perma.cc/8QJS-LA4H].

4. Spencer, *supra* note 2; Parks, *supra* note 1.

5. Spencer, *supra* note 2.

6. Kish & Reilly, *supra* note 1.

7. See Tammy Tierney, *Target Taps Trends for New Wild Fable Line*, BUS. J. (Aug. 6, 2018), <https://www.bizjournals.com/bizwomen/news/latest-news/2018/08/target-taps-trends-for-new-wild-fable-line.html> [https://perma.cc/VTk2-YAAV]. Compare WILDFANG, <https://www.wildfang.com/> [https://perma.cc/XS9Q-AFLT], with *Wild Fable*, TARGET, <https://www.target.com/b/wild-fable/-/N-e6p1m> [https://perma.cc/AR6N-5YZN].

8. Complaint & Demand for Jury Trial at 7–15, *Wildfang Co. v. Target Corp.*, No. 3:20-cv-00195 (D. Or. Feb. 4, 2020), ECF No. 1.

9. See, e.g., Oral Argument: Transcript of Proceedings at 11, 32, *Wildfang Co. v. Target Corp.*, No. 3:20-cv-00195 (D. Or. Jan. 20, 2022), ECF No. 132.

who had never previously heard of the company. In addition, because Wild Fable sells its products at significantly lower price points than Wildfang,¹⁰ Wild Fable consumers saw Wildfang as an aspirational brand—a “currently unaffordable ‘dream brand[]’” that an individual “possesses a desire to purchase upon reaching a higher professional status, income[,] and/or social class.”¹¹ Fashion websites listed Wildfang as a “splurge” and offered other brands’ products as less-expensive alternatives,¹² while consumers posted online about how they wanted to wear Wildfang but could only afford Target’s Wild Fable brand.¹³

Target’s introduction of a gender-neutral clothing line also signaled that such styles had become much more mainstream than in 2013 when Wildfang was first founded. A larger market for these products had been created, and Target’s entrance into that space would further crowd in a number of consumers who would be newly interested in purchasing such styles, from any company—including Wildfang.

Although *Wildfang v. Target* settled on undisclosed terms before trial,¹⁴ this case brings to light a little-discussed concept about infringement: infringement may not be completely harmful to the owner of the infringed-on trademark. In fact, infringement might have some positive commercial effects. As *Wildfang* illustrates, infringement might benefit some brands by (i) increasing awareness of the infringed-on brand to those already interested in such products; (ii) positioning the infringed-on brand as the “authentic” or “original” type of a certain product—thereby allowing the infringed-on product to be seen as an aspirational brand and even command

10. See Marah Eakin, *The 18 Best Wide-Leg Pants, from Sailor Styles to Culottes*, INSTYLE (May 14, 2024, 10:53 AM), <https://www.instyle.com/best-wide-leg-pants-8647417> [<https://perma.cc/BZ26-F6RW>].

11. Philip J. Trocchia, Ruby Q. Saine & Michael G. Luckett, *I’ve Wanted a BMW Since I Was a Kid: An Exploratory Analysis of the Aspirational Brand*, 31 J. APPLIED BUS. RSCH. 331, 332 (2015); see also CAMBRIDGE BUSINESS ENGLISH DICTIONARY 39 (2011) (defining *Aspirational Brand*); Pamela N. Danziger, *Luxury Consumers Haven’t Gone ‘Post-Aspirational,’ Rather They Aspire for Different Things*, FORBES (Mar. 14, 2021, 12:59 PM), <https://www.forbes.com/sites/pamdanziger/2021/03/14/luxury-consumers-havent-gone-post-aspirational-rather-they-aspire-for-different-things/> [<https://perma.cc/QAA6-ADNX>].

12. E.g., Anita Dolce Vita, *Splurge vs. Steal: Affordable Versions of Your Favorite Brands*, DAPPERQ (June 5, 2014), <https://www.dapperq.com/2014/06/splurge-vs-steal-affordable-versions-of-your-favorite-brands/> [<https://perma.cc/WK9Q-YFZD>].

13. Cf., e.g., u/SmolSpicyNoodle, REDDIT, https://www.reddit.com/r/lesbianfashionadvice/comments/1axpe6v/comment/krv5s8r/?utm_source=share&utm_medium=web3x&utm_name=web3xcss&utm_term=1&utm_content=share_button [<https://perma.cc/RH47-7VZT>] (listing Target’s Wild Fable and Wildfang next to each other and noting that “these aren’t all cheap” but are places to get “skater masc workwear”).

14. See Stipulation of Dismissal with Prejudice, *Wildfang Co. v. Target Corp.*, No. 3:20-cv-00195 (D. Or. Feb. 1, 2022), ECF No. 194. Wildfang entered into a licensing deal with Nordstrom after it sued Target but before settlement. See *Nordstrom Introduces BP. + WILDFANG Collaboration*, PR NEWswire (May 24, 2021, 1:21 PM), <https://www.prnewswire.com/news-releases/nordstrom-introduces-bp--wildfang-collaboration-301297882.html> [<https://perma.cc/UT5E-39FH>].

a higher price point; and (iii) broadening the appeal of a type of product such that it becomes mainstream enough to crowd in additional consumers who originally wouldn't have considered buying the infringed-on company's product. Part I of this article more fully discusses and explains these exposure-increasing, brand-strengthening, and market-expanding benefits.

Legal recognition for the idea that infringement has benefits might prove difficult. But a roadmap exists in a parallel property law concept: the writ of waste. For centuries, the longstanding formulation of the doctrine of waste went something like this: those making changes to property they possess—but don't own—can be sued by owners for damages.¹⁵ This axiom held true regardless of whether the change increased or decreased the value of the property.¹⁶ But over time, courts shifted from this rigid approach and began to recognize that acts of waste which increase the value of the underlying property should, in some circumstances, be permitted.¹⁷ The majority of jurisdictions now accept this view of ameliorative waste.¹⁸ Part II discusses this transition and argues that trademark law should similarly recognize that some infringement might yield commercial benefits: ameliorative infringement.

But how should these benefits be accounted for when remedies are assessed? Part III interrogates this question. Ameliorative infringement as a concept highlights a broader issue that recurs in multiple legal fields: what to do with benefits bestowed by wrongdoers. On the one hand, giving wrongdoers some sort of credit or discount for those benefits seems to allow them to profit from their wrongdoing. It decreases the deterrent value of such damages. On the other hand, allowing plaintiffs to fully reap these benefits—which go beyond plaintiffs' own actual efforts and potentially what plaintiffs could have achieved on their own—seems like a windfall to plaintiffs. They essentially get free labor out of the wrongdoer in terms of the benefit bestowed.

To prevent either side from being unjustly enriched, this article proposes a novel third approach. Wrongdoers should not be able to benefit at all from their wrongdoing. As such, they should pay full damages and not receive a discount. But at the same time, to prevent windfalls—and to benefit society at large, which is itself harmed by defendants' wrongdoing¹⁹—plaintiffs should not receive the value of the benefits conferred. Instead, the value of

15. THOMAS W. MERRILL, HENRY E. SMITH & MAUREEN E. BRADY, *PROPERTY: PRINCIPLES AND POLICIES* 555–56 (4th ed. 2022).

16. *Id.* at 556.

17. *Id.* at 556–57.

18. *Id.*

19. *See infra* Part V.

the benefits should be awarded to a neutral third party that promotes public interest causes in the area of law in which the wrongdoing occurred. This article suggests that in the context of trademark infringement, these damages should be awarded in a way that benefits the public related to the infringement: for example, to a nonprofit that helps small businesses secure their intellectual property rights. This approach, although seemingly outside-the-box, is supported by examples from three other areas of the law.

Furthermore, courts could adopt this approach under the trademark damages statute as written—the subject of Part IV. Defenses deriving from longstanding property law concepts are encouraged under the statute and frequently invoked in the trademark space. This gives the concept of ameliorative infringement, originating from ameliorative waste, a leg to stand on. And as written, 15 U.S.C. § 1117 hands immense discretion to judges to apply principles of equity and make damages awards fair. Public interest damages in cases where ameliorative infringement is proved thus could be a real possibility.

In sum, this article argues that courts should recognize a doctrine of ameliorative infringement when assessing damages in a trademark lawsuit, but that the ameliorative value of the infringement should be awarded as public interest damages.²⁰ Part V concludes by placing this concept in the

20. To the author's knowledge, it is the first article to suggest such an idea. Other authors have noted the possible benefits of infringement in related areas, but not in trademark. For example, García has argued that "[i]nfringement does not always harm rightsholders" and that some copyright holders actively encourage and monetize infringement because "it benefits them." Kristelia García, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 270, 335 (2020); *see also id.* at 276. She notes examples of what she calls "profitable infringement" in the copyright space where infringement results in income for a rightsholder. *Id.* at 283. Relatedly, Fromer highlights that "market benefits might accrue to copyright holders from defendants' unauthorized uses" and suggests looking at the "net" of the harms and the benefits. Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 630 (2015); *see also id.* at 629–41. Lee seeks to reform the reverse doctrine of equivalents (RDOE) in patent law based on an accession analysis. Peter Lee, *The Accession Insight and Patent Infringement Remedies*, 110 MICH. L. REV. 175, 202–03 (2011). Under his proposal, "courts would consider the value of an infringing improver's contribution over the original patent in determining appropriate remedies," *id.* at 179, and "substantial" improvers would essentially receive discounted damages (rather than be found to be non-infringing, as the live-but-almost-never-used RDOE provides for), *id.* at 202–03. *See also* Deepa Varadarajan, *Improvement Doctrines*, 21 GEO. MASON L. REV. 657, 689–91 (2014) (describing RDOE and its current state and noting that its "all-or-nothing result" may be why courts are "wary of applying it"). Varadarajan surveys property law's treatment of "unauthorized improve[rs]" and questions why courts largely do not consider such improvements in the context of intellectual property. *Id.* at 658, 683. She notes that these doctrines refine property's basic exclusionary regime and try to reestablish proportionality in instances where property owners gain an unearned advantage. *Id.* at 658, 662. Yet "[e]xplicit consideration of the fact of improvement—e.g., an assessment of the value contributed by the second-comer's unauthorized act—is largely absent from courts' assessment of infringement liability and appropriate remed[ies]." *Id.* at 659. Varadarajan discusses how the fair use defense in copyright could act, in part, as such an assessment. *Id.* at 698–99. But, like RDOE, courts are hesitant to apply it because it is an all-or-nothing defense. *Id.* at 714. The term "public interest damages" has been used previously by Janeček. Václav Janeček, *Public Interest Damages*, 40 LEGAL STUD. 589 (2020). But that

context of a seminal piece of legal scholarship, *One View of the Cathedral* and questioning the bilateral lens through which legal disputes are often viewed.²¹

I. A CONCEPT: THE BENEFITS OF INFRINGEMENT

Currently, trademark law views all infringement as detrimental. This Part will describe several possible benefits to a brand being infringed on: exposure-increasing, brand-strengthening, and market-expanding benefits. It analyzes the causes of these benefits and pulls from the introductory “Fang v. Fable” example.²² It concludes by sketching a hypothetical scenario in which these benefits might, on a financial basis, weigh heavily against the harm of sales lost due to infringement.

Several propositions underlie this analysis. The first relates to a fundamental inquiry in any trademark infringement suit. Although multiple factors are used to assess whether infringement has occurred, the likelihood that consumers will confuse defendant’s and plaintiff’s marks is critical to most courts’ decisionmaking.²³ But even in a scenario where some consumers will be confused, others will not.²⁴ These non-confused consumers are little studied or discussed.²⁵ Yet they may play an important role. This article suggests that the actions of these non-confused consumers in response to infringement may ultimately benefit the infringed-on brand.²⁶

Second, the benefits described below would occur more frequently in a scenario known as reverse confusion. Reverse confusion happens when a large, well-known company infringes on the trademark of a smaller, niche

piece uses the term as a synonym for the category of all non-compensatory damages—including, for example, nominal damages, and does not in any way contemplate awarding damages to public interest organizations. *See, e.g., id.* at 597–98.

21. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

22. This example is far from unique, although most other commentators have focused on the publicity value that come from being involved in a trademark dispute rather than the benefits that occur prior to and regardless of the dispute. *See, e.g.,* Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions*, 37 COLUM. J.L. & ARTS 211, 221 (2014) (describing the benefits to small businesses that have faced “trademark bullying” by larger companies).

23. PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2023, VOLUME II: COPYRIGHTS, TRADEMARKS & STATE IP PROTECTIONS* 1047 (2023) (calling the likelihood of confusion “[t]he touchstone of trademark infringement”).

24. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 77 (2008).

25. *Id.* at 77–87 (calling standard trademark narrative “incomplete” for its inadequate assessment of nonconfused consumers).

26. Especially with regard to the brand-strengthening benefits. *See infra* Section I.B.

company.²⁷ Courts have recognized that reverse confusion is an important trademark doctrine. Without it, “a company . . . with the economic power to advertise extensively for a product name taken from a competitor” would be “immuniz[ed] from unfair competition liability.”²⁸ At the same time, one judge colorfully described reverse confusion liability as potentially placing “a bazooka in the hands of a squirrel, used to extract from a more fearsome animal a bounty which the squirrel would never be able to gather by his own labors”²⁹—the idea being that a small company could force a larger company to pay an outsized settlement due to a potentially infringing trademark. This tension found in the doctrine of reverse confusion calls for solutions.

Third, the Supreme Court has long observed that trademarks and the products they are used to sell cannot be separated.³⁰ Indeed, that is one of the major purposes of trademarks: they are a marketing tool to sell products.³¹ Therefore, this article relies on research from marketing and

27. “Reverse confusion occurs when a larger, more powerful company uses the trademark of a smaller, less powerful senior owner . . .” *Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 474 (3d Cir. 1994); *see also id.* (collecting cases from the Second, Fifth, Sixth, Seventh, and Tenth Circuits using this term and definition). Reverse confusion is a relative newcomer to trademark doctrine, only gaining widespread acceptance in the 1980s. Jeremy N. Sheff, *Reverse Confusion and the Justification of Trademark Protection*, 30 GEO. MASON L. REV. 123, 130–35 (2022). Some scholars continue to criticize it, unfairly characterizing it as being “premised on an unsuccessful . . . business blaming its failures . . . on a more successful company.” *Id.* at 135. Of course, that is not always the case, as demonstrated by the Wildfang example in which a small, successful company was copied by a larger, successful company. Regardless, these benefits might occur in other infringement scenarios beyond reverse confusion.

28. *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1372 (10th Cir. 1977) (quoting *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219, 1236 (D. Colo. 1976)).

29. *Uber Promotions, Inc. v. Uber Techs., Inc.*, 162 F. Supp. 3d 1253, 1280 (N.D. Fla. 2016).

30. As Justice Frankfurter described:

The protection of trade-marks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. *Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears.* Once this is attained, the trade-mark owner has something of value. . . . The creation of a market through an established symbol implies that people float on a psychological current engendered by the various advertising devices which give a trade-mark its potency.

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205, 208 (1942) (emphasis added).

31. Dennis S. Corgill, *Measuring the Gains of Trademark Infringement*, 65 FORDHAM L. REV. 1909, 1937–39 (1997) (stating that trademarks have gone beyond their historical function of identifying the source of a product to signaling a “stylized image” connected to a set of goods and primarily function as a marketing tool).

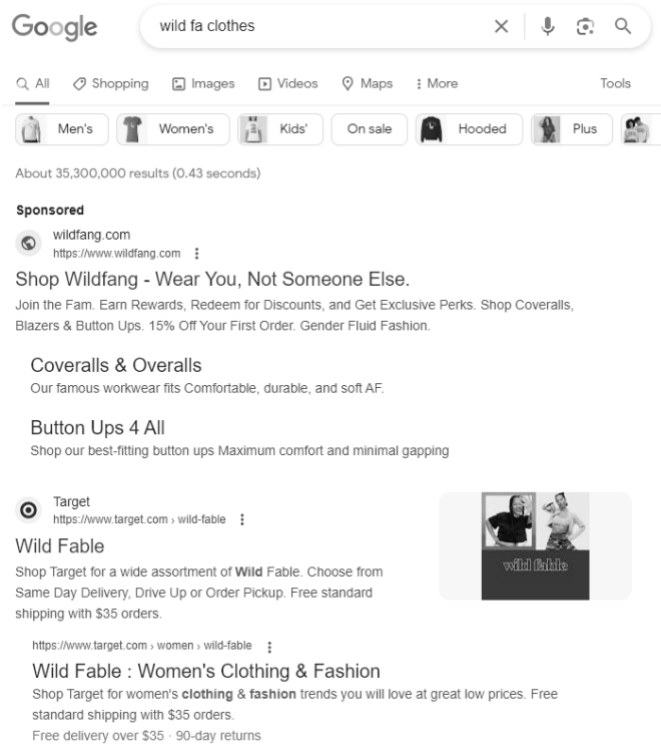
advertising experts to draw some of its conclusions.³² From that perspective, trademark law as a way to prevent unfair competition roots this article's analysis.³³ Since one of the goals of trademark law is to make competition fair, this article seeks to provide an additional perspective on what "fair" is. If a trademark plaintiff receives any of the benefits discussed below, then they should be accounted for in determining the true, absolute value of the harm done by an infringer.

A. *Exposure-Increasing*

Trademark infringement may increase exposure for an infringed-on brand because consumers may find the infringed-on brand when searching for the infringing brand. This has increasingly become true in light of modern consumers' penchant for technology-enhanced shopping. Consider the example above of Wildfang and Wild Fable. A consumer who encountered ads for Target's Wild Fable line but could not recall its exact name might search online for "wild fa clothes" in hopes to locate it. If she did, she would find:

32. "[T]he fundamental thesis of brand equity strategy is that, to achieve competitive advantage and, thereby, superior financial performance, firms should acquire, develop, nurture, and leverage' . . . [a] high-equity brand or portfolio of brands." Sreedhar Madhavaram, Vishag Badrinarayanan & Robert E. McDonald, *Integrated Marketing Communication (IMC) and Brand Identity as Critical Components of Brand Equity Strategy*, 34 J. ADVERT. 69, 69 (2005). High equity brands are those with "strong and highly favorable brand associations of customers." *Id.* All marketing programs, such as product, price, advertising, promotion, and distribution, can potentially create and maintain brand equity. *Id.* at 71. Brands will likely not be successful unless their users perceive the "traditional determinants of brand preference" such as "exceptional performance, trustworthiness, [or] good-looking design." Joseph W. Alba & Richard J. Lutz, *Broadening (and Narrowing) the Scope of Brand Relationships*, 23 J. CONSUMER PSYCH. 265, 266 (2013) (citations omitted). Other "long-established determinants of loyalty" include "switching costs, risk aversion, social pressure, ignorance, inertia, and market constraints." *Id.*

33. ROBERT P. MERGES, PETER S. MENELL, MARK A. LEMLEY, *INTERNATIONAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 765 (6th ed. 2012) (describing how unfair competition and consumer protection are the fundamental principles underlying trademark law).



Such a search would locate both Wild Fable's and Wildfang's clothes. Similarly, a search for "wild clothes female" yields Wildfang as the first result, not Target's Wild Fable.³⁴ So a consumer who had never heard of Wildfang could find out about it, simply by searching for Target's infringing products, because of Target's advertising for those infringing products.³⁵ Taking this example in the abstract, if a larger company infringes on a smaller company, its marketing efforts for the infringing brand may in fact expose some consumers to the smaller, infringed-on brand—including consumers who had never heard of the smaller, infringed-on brand in the first place.

34. Noting, of course that in the particular search pictured above, Wildfang is a sponsored ad, meaning that it paid for Google to promote them. The same search by the author done at other times and locations has returned different results, but Target's Wild Fable clothes and Wildfang's clothes always come up within the first three results regardless.

35. García calls this "promotional infringement"—when infringement "amounts to valuable and cost-efficient promotion for the rightsholder's content." García, *supra* note 20, at 283.

The key mechanism here is modern technology. More and more shopping is done online.³⁶ While some online shopping is done on particular companies' sites, much online shopping takes place in online marketplaces.³⁷ Or customers simply type a description of the item into a search engine. Either way, these websites aggregate products from multiple companies in the same online location. Different companies' similar products are displayed side by side based on what consumers search for. In effect, this allows consumers to be inside multiple stores for multiple companies at the same time, comparing price and quality for similar items.

Even when shopping in person, consumers now incorporate technology into their shopping practices. While shopping in a particular company's store, consumers will frequently look up the product they are considering buying online to compare it to other, similar products from other companies. At the very least, they will see if other such products exist and who makes them.

In both of these settings, a search for a product sold under the infringing brand name will yield similarly named related products. And this will likely include products sold under the infringed-on brand. Again, this shows that infringement may expose the infringed-on product to new consumers who wouldn't have found it otherwise. This will especially be the case if the infringing product is heavily advertised. That advertisement, because of consumers' new technology-enabled shopping habits, will likely also bring new potential buyers to the infringed-on product.³⁸

B. Brand-Strengthening

Another potential benefit of having a trademark infringed on is a strengthening of the perceived value of the infringed-on brand.³⁹ For example, imagine an infringing company uses its infringing mark for a

36. See, e.g., DIGITAL COMMERCE 360 RESEARCH, 2021 ONLINE MARKETPLACES REPORT 9, 15, 17 (2021) (more than \$1 in \$5 that was spent on consumer goods in a recent year was spent on the web—\$4.29 trillion dollars spent online in pandemic-fueled 2020, but even in 2019, \$3.46 trillion was spent online; in the U.S. alone, those numbers are \$791.70 billion and \$598.02 billion).

37. *Id.* at 3, 5, 9 (“Online marketplaces are digital shopping malls where consumers can purchase from a variety of merchants on one site” and are predicted to be 2/3 of total online spending in the next three years; 92% of consumers shop on online marketplaces); see also *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930 (9th Cir. 2015) (providing an example of consumers shopping in an online marketplace).

38. There might be some initial confusion about which brand is the original and which is the best quality, but this is easily solved by reading reviews and additional searching. Even if consumers do not take these steps, online marketplaces make clear which company a consumer is buying from—it is difficult to mistakenly buy from one company when you think it is another. Online marketplaces have an incentive to do this. Otherwise, merchants in the marketplace would become unhappy and leave.

39. But see J. L. ZAICHKOWSKY, *THE PSYCHOLOGY BEHIND TRADEMARK INFRINGEMENT AND COUNTERFEITING* 1 (2006) (contending that there could be a “potential reduction in the perception of the original brand’s quality or image due to the cheaper price or inferior quality of the infringing brand”).

mass-produced, lower-quality version of the product whose mark has been infringed. When consumers find out about the two different products, they may see the infringed-on brand as denoting the original or authentic version of the good.⁴⁰ Because of this, non-confused consumers may perceive the infringed-on brand as of a higher quality or more trustworthy than the infringer's version of the similar product.⁴¹ And, as a result, they may be willing to pay more for the infringed-on version.

In short, a lower quality infringing brand—a “knock-off”—may create differentiation in the market, with the infringed-on brand being seen as superior to the infringing brand.⁴² Tiering the market in this manner may allow the infringed-on brand to continue to command higher prices than the infringing brand.⁴³ It could even allow the infringed-on brand to increase its prices over and above what it had been charging as a result of being seen as original, authentic, and higher quality.

If the differentiation is great enough, the infringed-on version may even become an aspirational brand. An aspirational brand is a currently unaffordable “dream brand” that an individual desires to own upon reaching a higher status, income, or social class.⁴⁴ Aspirational brands are different from luxury brands. Luxury brands are purchased for their recognition as being expensive and signaling high social class to others. In contrast, aspirational brands may vary from person to person based on each person's

40. Cf. Madhavaram, Badrinarayanan & McDonald, *supra* note 32, at 77 (stating that feedback from consumers and competitors helps set brand strategy).

41. See Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1611 (1998) (describing how trademarks “lower search costs by allowing consumers to distinguish between products that differ in quality but that, in the absence of differing brand names, would be difficult or impossible to distinguish at the point of purchase”); cf. ZAICHKOWSKY, *supra* note 39, at 7 (“Brand names go beyond products and represent information about a variety of attributes linked to a product . . . such as its features, meaning, and quality . . .”); *id.* at 9 (brand as insurance policy for consumer).

42. See *infra* notes 44–45 & 47.

43. ZAICHKOWSKY, *supra* note 39, at 8 (“The stronger the brand's image, the more the original brand can charge above its competitors because consumers are willing to put value on that image.”). *But cf.* Corgill, *supra* note 31, at 1921 n.55 (arguing that infringement may require a mark owner to sell its products at a lower price).

44. Trocchia, Saine & Luckett, *supra* note 11, at 332. “In fact, these [aspirational brands] may be among the most powerful motivators of consumer behavior. . . . [They] may encompass fantasies, mental ‘rehearsals’ of owning the brand, and even concrete (if long-term) purchase intentions.” Alba & Lutz, *supra* note 32, at 267.

set of interests and the way they wish to be perceived.⁴⁵ By becoming aspirational, a brand can set premium prices for its products.⁴⁶

For example, an offroad-ready Toyota Tacoma or 4Runner may be aspirational brands for someone who is interested in outdoor activities like camping, fishing, hunting, or skiing. These vehicles do not broadly signal wealth in the way a Rolls-Royce might. Nevertheless, for someone in the specific “world” of outdoors enthusiasts who currently drives a used Honda Pilot, a Tacoma or a 4Runner may be a vehicle she desires to purchase upon getting a promotion or a new job with a higher income. This purchase will signal what type of person she is; it runs with her identity.⁴⁷

In the case discussed in the introduction, Wildfang became seen by consumers as an aspirational brand after Target introduced Wild Fable. Consumers posted on social media that they wanted to buy Wildfang but could only afford Wild Fable. Blogs and other websites made posts showing what products to buy from Wild Fable if a person liked similar Wildfang products but didn’t want to spend at the Wildfang price point.

At first glance, this seems like Wild Fable blatantly stealing sales. But many consumers who purchased Wild Fable would not be able to afford

45. See Alba & Lutz, *supra* note 32, at 267 (differentiating luxury brands like Rolex watches from aspirational brands “with which the consumer desires closer proximity”); see also S. Sreejesh, *Consumers’ Perceived Brand Aspiration and Its Impact on Intention to Pay Price Premium: Moderating Role of Brand Jealousy*, 5 THEORETICAL ECON. LETTERS 273, 275 (2015) (differentiating aspirational brands from “status consumption,” which “reflects one’s desire to gain status or social prestige from the acquisition and consumption of goods . . . these desires can develop without any . . . aspiration” (citations omitted)); Morgan K. Ward & Darren W. Dahl, *Should the Devil Sell Prada? Retail Rejection Increases Aspiring Consumers’ Desire for the Brand*, 41 J. CONSUMER RSCH. 590, 592, 605 (2014) (distinguishing aspirational products from “luxury merchandise” and noting that “individuals who are motivated to differentiate themselves from the masses may signal their aspirational self-concepts via new product domains”); Trocchia, Saine & Luckett, *supra* note 11, at 332, 340 (similarly differentiating aspirational brands from luxury brands). At least two authors tie aspirational brands to the rise of social media and consumers’ desire to show self-expression rather than just wealth. Trocchia, Saine & Luckett, *supra* note 11, at 334; Carey K. Morewedge, Ashwani Monga, Robert W. Palmatier, Suzanne B. Shu & Deborah A. Small, *Evolution of Consumption: A Psychological Ownership Framework*, 85 J. MKTG. 196, 203 (2021); see also Renée Ann Richardson Gosline, *The Real Value of Fakes: Dynamic Symbolic Boundaries in Socially Embedded Consumption* 21–22 (May 5, 2009) (Ph.D. dissertation, Harvard Business School) (ProQuest) (studying the market for knock-off versions of designer purses and finding that consumers continued to aspire to purchase the authentic brand).

46. Sreejesh, *supra* note 45, at 274, 279 (hypothesizing and finding that “brand aspiration might influence behavior, particularly consumers’ willingness to pay price premium”). By becoming aspirational, brands can “keep away from intense price competition and . . . generate a competitive edge over other brands.” *Id.* at 280. An example of an aspirational good commanding premium pricing is that consumers “are willing to pay more for the ‘green halo’ generated by a Prius purchase over other hybrid vehicles, which did not as explicitly signal their ideal ‘green’ self-concept.” Ward & Dahl, *supra* note 45, at 592.

47. Alba & Lutz, *supra* note 32, at 266 (noting that “[i]ncorporation of both emotions and the self into brand-consumer relationships . . . provides a much richer conceptualization than does traditional brand attitude” and that “a brand is purchased for what it communicates about the user”); cf. Sreejesh, *supra* note 45, at 275 (explaining that characteristics of one’s ideal future self may influence what brands are purchased).

Wildfang in the first place: Wildfang priced its clothes significantly higher than Wild Fable. As such, only some of Wildfang's sales in this context were truly lost to Wild Fable. What was happening—and remains clear from recent online posts⁴⁸—is that Wildfang came to have the reputation of being the original and authentic gender-neutral, politically active women's clothing brand. Those wishing to represent that they supported left-leaning policies and embraced these social positions desired to wear Wildfang, even if they could not yet afford it.

In sum, Wildfang became an aspirational brand among a specific demographic of consumers. This, in turn, likely enabled Wildfang to continue charging its higher prices. And it perhaps even allowed Wildfang to increase prices.⁴⁹

C. Market-Expanding

A third possible benefit of infringement is an expansion of the market size for the category of goods sold under the infringed-on brand. If an infringing brand broadens the appeal for a category or categories of items, that may crowd in additional sales for the infringed-on brand.⁵⁰ Essentially, a well-known infringing brand may move a type of product from a niche market to broad acceptance and desire. It may create a trend. If this happens, additional consumers will buy the infringed-on brand—simply because it is selling products that have now become more mainstream to own. In short, the market-expanding benefit posits that infringement creates a greater absolute number of consumers wishing to buy a product or products from any seller, including the seller whose brand was infringed.

This benefit is different from the exposure-increasing benefit described above. The exposure-increasing benefit pertains to customers who were already looking to purchase a certain type of product, either from the

48. See, e.g., Eakin, *supra* note 10 (comparing Wildfang pants to Wild Fable pants and calling Wildfang a “brand that challenges gender norms . . . committed to inclusion . . . and giving back,” while describing Wild Fable's pants as having a “low price point,” “basic,” and “budget”).

49. There is also some research showing that infringements may drive authentic producers to increase quality themselves to further cement their products as being superior and therefore worthy of a higher price point. See Yi Qian, *Counterfeiters: Foes or Friends?* 22, 28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16785, 2011).

50. Cf. García, *supra* note 20, at 282 (noting that “some courts have begun to recognize that market benefits ought to count” when analyzing claims of copyright infringement). García gives the example of HBO, whose show *Game of Thrones* was named the “most pirated show” of 2012, with approximately four million illegal downloads. *Id.* at 298. Although these downloads were illegal, the CEO of HBO's parent company boasted proudly about these numbers. *Id.* at 299. According to him, the illegal downloads created intense internet buzz, which in turn led to more paying HBO subscribers. *Id.* at 299–300. Similarly, García argues that streaming sites like Netflix had (at least initially) not cracked down on the sharing of login information because this ultimately leads to a larger market for paid subscribers. *Id.* at 300–01.

infringing or the infringed-on brand. The market-expanding benefit looks to the way that an infringing brand may bring new consumers to purchase goods who weren't originally in the market for such goods.

Returning to "Fang v. Fable," Wild Fable was much more widely distributed and advertised than Wildfang. Wildfang has an online presence and two brick-and-mortar stores on the west coast; Wild Fable is available in every Target nationwide and is supported by one of the world's most sophisticated marketing teams.⁵¹ Target's sales of gender-neutral and masculine-inspired styles of women's clothing under the Wild Fable brand created a larger market for such clothes. By helping to reinforce and broaden a trend that was already developing, Wild Fable increased the number of people who would be interested in buying such clothes—including from Wildfang.⁵²

D. Beneficial Infringement

The preceding three sections have posited potential benefits from having a brand infringed on. If any or all three of these benefits are present at the same time, they could substantially weigh against the value of sales lost to infringement.

Then, add another realistic constraint to the situation. Young, fast-growing companies can be chronically short of funds, even if they are profitable.⁵³ Costs related to the sale of a product are borne up front, while payment for the product does not happen until it is bought—or later, if the

51. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html> [<https://perma.cc/RJE5-3LFA>] (describing Target's extensive customer tracking abilities).

52. This example shows that the market-expanding benefit of infringement can lead to more sales of the infringed-on products as well. A related phenomenon may be present in some copyright infringement suits. For example, imagine a famous musician creates a new song that becomes quite popular. Further imagine that later, another artist sues the famous musician for copying her song. The artist whose song was copied will likely receive a substantial boost in attention because of the notoriety of the famous musician who copied her song. This may translate into increased streaming revenue as people listen to both songs to compare them. And if listeners like the infringed-on song, they may listen to other music by that artist, increasing her overall popularity (and revenue). Similar to what was described above, an infringer can increase the market size for an infringe. See David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1810 (2013); see also, e.g., García, *supra* note 20, at 270 (referring to George Harrison's "My Sweet Lord" copying The Chiffon's "He's So Fine"); *id.* at 285–89, 295–98 (describing how musical artists have, for the most part, not sued makers of YouTube videos that use their copyrighted songs because these videos can create a larger market for their music); cf., e.g., Jonathan Stempel, *Jay-Z Defeats Copyright Claims over "Big Pimpin,"* REUTERS (May 31, 2018, 1:35 PM), <https://www.reuters.com/article/lifestyle/jay-z-defeats-copyright-claims-over-big-pimpin-idUSKCN1IW2R2/> [<https://perma.cc/BLM2-2CTS>] (describing *Fahmy v. Jay-Z*, 908 F.3d 383, 385 (9th Cir. 2018), and proving that allegations of copyright infringement can bring attention to the alleged infringer's work).

53. See, e.g., MICHAEL W. PREIS, 101 THINGS I LEARNED IN BUSINESS SCHOOL 38 (Matthew Frederick ed., 2d ed. 2010).

company allows customers to pay on a payment plan.⁵⁴ Therefore, until payment is received, even a profitable company might be short on funds.⁵⁵

Consider this in the context of trademark infringement. A company has a new, successful product that it advertises with a trademark. The product is selling well. But if the product gains too much traction and sells too fast, too quickly, the company may not be able to meet demand.⁵⁶ And the company, like many young, fast-growing companies, is too cash-strapped to increase production to meet the rising demand.⁵⁷

In this situation, a company making a similar product and selling it under an infringing trademark may not be stealing sales at all. Why? Because the infringed-on company had no capacity to actually make any of the allegedly stolen sales.⁵⁸ Now, what if at the same time the infringed-on company reaps the exposure-increasing, brand-strengthening, and market-expanding benefits outlined above? The possibility of infringement that also creates some value for the infringed-on company becomes a real possibility.⁵⁹

54. *Id.*; cf. Peter Lee, *Distinguishing Damages Paid from Compensation Received: A Thought Experiment*, 26 TEX. INTELL. PROP. L.J. 231, 248 (2018) (proposing a framework for patent damages that would take into account the patentee's costs to invent and commercialize the product).

55. PREIS, *supra* note 53. Companies of course can borrow or sell equity to fund expansion. But for new companies without a long track record of success, these costs can initially be quite high.

56. According to some scholars, creating the appearance or reality of a limited supply via limited production quantities is a strategy employed by some aspirational brands. *See, e.g.,* Elisabetta Merlo & Mario Perugini, *The Revival of Fashion Brands Between Marketing and History: The Case of the Italian Fashion Company Pucci*, 7 J. HIST. RSCH. MKTG. 91, 104 (2015).

57. This possibility may be all the more the case in an era of high borrowing costs and lessened appetite for early-stage investing.

58. Relatedly, in many jurisdictions, a fiduciary is allowed to take a corporate opportunity if the corporation is not in a financial position to do so. This is known as the defense of "incapacity" to charges of usurping a corporate opportunity. WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 359, 359 n.51, 360 n.52 (6th ed. 2021) (discussing how courts have changed from forbidding this defense to allowing it (first citing *Miller v. Miller*, 222 N.W.2d 71 (Minn. 1974); then citing *Irving Trust Co. v. Deutsch*, 73 F.2d 121 (2d Cir. 1934))). Similarly here, a trademark plaintiff may have lacked the capacity to produce the volume that defendant produced. In addition, other factors that differentiate a plaintiff's and a defendant's businesses could have caused the defendant's sales to be higher than what plaintiff could have sold, including defendant's greater efficiencies, marketing prowess, lower pricing, a larger consumer base, etc. This article does not purport to analyze all of these factors but instead provides a theoretical argument based on the benefits described, while acknowledging that other benefits may (and likely do) exist on a case-by-case basis.

59. One criticism of this idea is that if a company knew it were receiving benefits from infringement, then it would simply decide not to sue. There is some evidence that this sort of behavior takes place in the luxury goods industry. *See* Louise Nash, Gina Vetere & Mark Young, *Responding to the Hidden Threat: How Luxury Brands Are Fighting Back Against Counterfeiting*, WORLD TRADEMARK REV., Feb./Mar. 2014, at 58–59. However, that logic does not account for the possibility that a company might receive some of the above-listed benefits, while at the same time the harm from the infringement might outweigh them. In that scenario, the company could sue, recover lost profits, and not have to account in any way for the benefits it gained. Similarly, many trademark disputes also involve an injunction forbidding the infringing company from continuing to use its infringing mark. An injunction would cut off the benefits described for plaintiff. But it still allows plaintiff to have benefited in these ways from defendant's behavior prior to the injunction without having to account for these benefits.

Of course, it is also possible that infringement could have both harmful and beneficial effects. In these cases, the net impact of the infringement should be taken into consideration.

II. A POTENTIAL ROADMAP: AMELIORATIVE WASTE

Seeing infringement as having benefits to the infringed-on brand is a marked departure from current perceptions. A sizeable conceptual shift would be necessary before courts might recognize this idea. However, such a shift has happened in the past, and in a property doctrine that can in many ways be analogized to infringement.

The doctrine of waste involves property users who act in ways contrary to the rights of the owners of that property, similar to the way trademark infringers essentially misuse something that does not belong to them (by copying it). As this section will describe, the law originally characterized that misuse as always being violative of the property owner's rights. It did not account for any improvements to the property that might have come from that misuse. In the same way, trademark law does not currently contemplate that infringed-on brands might derive benefits from infringement. But over time, American courts transformed this doctrine such that the majority rule across jurisdictions requires taking into consideration the value of any potential improvements—so called “ameliorative waste.” Similarly, courts might recognize the concept of “ameliorative infringement.”

As such, the transformation of the doctrine of waste provides a partial roadmap for how the benefits of infringement—ameliorative infringement—could be recognized. However, the modern majority rule for ameliorative waste neglects a central tension, which Part III attempts to address.

A. The “English Rule”

The basic starting point for the doctrine of waste is that property users who make changes to property they don't own can be sued for damages.⁶⁰ At its inception, waste was about preventing real property tenants from jeopardizing the interests of the properties' actual owners.⁶¹ Property scholars cite two English statutes from the 1200s as the first examples of

60. MERRILL, SMITH & BRADY, *supra* note 15, at 555–56.

61. Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1056 (2011).

protections against waste: the Statute of Marlborough in 1267 and the Statute of Gloucester in 1278.⁶²

From these two statutes, a fairly detailed body of waste law developed in England. Fundamentally, waste law constrained what actions tenants could take without the permission of the landowner. And it allowed landowners to bring writs of waste to enjoin tenants from undertaking certain activity.⁶³ For example, tenants could only cut timber from the land on which they lived that was necessary for “house bote,” “tool bote,” and “fire bote”—wood to maintain buildings, fashion tools, and keep fires going.⁶⁴ There were additional detailed rules requiring the use of deadwood before cutting trees, and a hierarchy of which trees on the property could be cut.⁶⁵

Tenants were also forbidden to vary the way land was used. They could use open mines for their benefit; maintain buildings and fences; and plough, sow, and reap arable fields.⁶⁶ But they could not dig new mines, build new buildings, or clear a forest to plant a garden.⁶⁷ Even if these activities would increase the overall value of the property, they were forbidden.⁶⁸ The “English Rule” saw a tenant’s role as that of a custodian, not a manager.⁶⁹

Over time, courts categorized waste into three categories. For any of the three types of waste, a successful legal action could result in treble damages, forfeiture, and an injunction.⁷⁰ The two main categories of waste were affirmative (also known as voluntary) waste and permissive waste.⁷¹ Affirmative waste occurs when a property user undertakes an affirmative act with regard to the property that is unreasonable and causes damage to the property’s long-term value.⁷² For example, imagine a tenant who leases

62. Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 662 (2006); Merrill, *supra* note 61, at 1056.

63. Purdy, *supra* note 62, at 662. The writ persists to this day in the form of a waste action. *See, e.g., Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *aff’d in relevant part*, 71 F.3d 77 (2d Cir. 1995). The elements for any type of waste action require a party to show “(1) that a tenant has taken some action, or failed to take required action; (2) that as a result of the tenant’s action or failure to act the fundamental character of the property has been changed; and (3) the action or inaction has caused ‘permanent or lasting damage.’” *Id.* at 335 (emphasis omitted) (citations omitted).

64. Purdy, *supra* note 62, at 663.

65. *Id.* (citing Blackstone).

66. *Id.* at 659, 663.

67. *Id.*

68. *Id.* at 663.

69. *Id.* at 665; *see also id.* at 673 (noting that “[w]hether waste had occurred depended more on a concept of appropriate use than on whether the estate’s value had increased, decreased, or held constant” (emphasis omitted)).

70. *Id.* at 662. Treble damages for waste appear to have begun with the Statute of Gloucester and continue to this day in many states for waste actions. Merrill, *supra* note 61, at 1056.

71. MERRILL, SMITH & BRADY, *supra* note 15, at 556.

72. *Id.* at 556; *see also, e.g., Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 335 (S.D.N.Y. 1994) (describing how “voluntary waste occurs when a tenant intentionally or negligently damages the premises”), *aff’d in relevant part*, 71 F.3d 77 (2d Cir. 1995).

an orchard and then decides to cut down the orchard to sell the trees for wood.⁷³ The tenant's actions would be an act of affirmative waste.⁷⁴

Permissive waste, on the other hand, occurs when a property user fails to take reasonable actions with regard to the property and damage is caused.⁷⁵ This could occur, for example, if a tenant allowed an adverse possessor to remain on the property.⁷⁶

The common law also traditionally recognized a third category of waste.⁷⁷ Similar to affirmative waste, this type of waste involved a land user undertaking unauthorized changes to property owned by another.⁷⁸ But the doctrine of ameliorative waste held that even if these changes *increased* the value of the property, they were forbidden.⁷⁹ Property users could not argue that their changes were value-increasing as a defense or even as mitigation for waste suits brought against them.

To return to the earlier example, imagine a tenant planting an orchard in an otherwise bare area of a property she is renting. If the orchard annually yields fruit that can be sold, this increases the overall value of the property. But because the tenant undertook this activity without consent of the property owner, this would still be considered waste under the common law rule. And the tenant would be liable to pay damages to the property owner for the harm of changing the property without the right to.⁸⁰ The tenant could not in any way reduce his liability for this waste. He could not argue that the orchard created more economic value or would ultimately benefit the property owner.

73. Merrill, *supra* note 61, at 1057.

74. *Id.*

75. MERRILL, SMITH & BRADY, *supra* note 15, at 556; *see also, e.g., Carter*, 861 F. Supp. at 335 (explaining that “permissive waste occurs when the tenant fails to prevent damage to the premises from the elements, such as by failing to replace a broken window that ultimately leads to water damage”); Merrill, *supra* note 61, at 1057.

76. MERRILL, SMITH & BRADY, *supra* note 15, at 556.

77. *Carter*, 861 F. Supp. at 335 (noting that the common law “recognized three actionable types of waste in connection with real property: (1) voluntary waste, also known as affirmative waste, (2) permissive waste, and (3) ameliorative waste”). In describing these forms of waste, the court noted that “[e]ach of these varieties of waste arises in the context of a landlord-tenant relationship: either the tenant does something, or fails to do something that it is obligated to do, that fundamentally changes the nature of the property that reverts to the owner at the conclusion of the tenancy.” *Id.*

78. *Id.* (discussing how ameliorative waste “occurs when a tenant alters a premises such that it is of changed character at the time it is returned to the owner”).

79. RESTATEMENT (SECOND) OF PROP. (LANDLORD & TENANT) § 12.2 (AM. L. INST. 1977), Reporter's Note, item 5, para. 2 (stating the common law rule as having been “any alteration of the premises which is injurious to the inheritance is not permissible even though it increases the value of the land”).

80. For another example of ameliorative waste see Merrill, *supra* note 61, at 1057 (turning a warehouse into a restaurant).

B. Jackson, Melms, and the Transformation of Ameliorative Waste

Two American cases that bookend the nineteenth century transformed the doctrine of waste. Decided by state supreme courts, these two decisions exemplified a new approach to ameliorative waste that became the majority rule nationwide.⁸¹

The first case was *Jackson v. Brownson*.⁸² Plaintiffs leased property to a tenant that included forested land.⁸³ The tenant cleared a sizable portion of the property; plaintiffs sued, claiming waste.⁸⁴ Tenant-defendant denied that it was waste to clear timber to make way for cultivation.⁸⁵ Although the state supreme court sided with plaintiffs, it adopted defendant's definition of the doctrine of waste: actions that did "permanent injury to the inheritance."⁸⁶ By adopting this formulation, *Jackson* set the stage for courts across the country to analyze a land user's actions economically.⁸⁷ "Injury to the inheritance" would transform into an inquiry into the financial value of the changes a land user made. If they increased the value of the property, there could not be any injury to its long-term value.

The seminal case that made this transition fully apparent took place in Wisconsin near the turn of the century. In *Melms v. Pabst Brewing Co.*,⁸⁸ Captain Pabst (of Pabst Blue Ribbon, a.k.a. PBR, fame) tore down a mansion in a former residential neighborhood that had become an industrial

81. Purdy, *supra* note 62, at 654.

82. 7 Johns. 227 (N.Y. Sup. Ct. 1810). Fraley disputes Purdy's reading that *Jackson* marks the beginning of courts' changed views toward waste. Jill M. Fraley, *A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas About the Transformation of Law*, 100 MARQ. L. REV. 861, 907 (2017). Instead, she points to *Pyncheon v. Stearns*, 52 Mass. (11 Met.) 304, 311 (1846). Fraley, *supra*, at 894–95. This viewpoint stems from Fraley's argument that waste law "historically protected not only property value but also property boundaries." *Id.* at 876, 900. "[W]aste law maintained boundaries in a system that allocated land and recorded land ownership through descriptive . . . markers, through land use . . . rather than through precise surveying technology." *Id.* at 876. Since title was defined based on descriptions of what existed on a piece of property, changing a property's structures or use could impair title. *Id.* at 900; *cf.* Purdy, *supra* note 62, at 664 (describing how waste was "an injury to the title"). With improved surveying technology and recording, waste no longer needed to guard property boundaries. Fraley, *supra*, at 891, 915 (noting that English law actually changed with American law based on the fact that surveying methods had improved such that buildings and structures on property were no longer needed to identify property boundaries).

83. Purdy, *supra* note 62, at 668.

84. *Id.*

85. *Id.* at 669.

86. *Id.* This formulation originally derived from Blackstone. *Id.*

87. *Id.* at 671–72 (collecting nineteenth century state supreme court cases from Massachusetts, Tennessee, Rhode Island, North Carolina, and Vermont showing modification to the waste doctrine).

88. 79 N.W. 738 (Wis. 1899).

area.⁸⁹ Pabst had the right to use the land, but others owned it.⁹⁰ The landowners challenged the mansion's demolition as waste.⁹¹

They lost.⁹² The Wisconsin Supreme Court held that since the surrounding area had changed, it was of little value to use the property as a residence.⁹³ Economically, the property was worth more with the mansion gone and the land ready to be used for commercial purposes, like the surrounding properties.⁹⁴

This rule of looking to changed circumstances and relative economic values eventually became a multifactor standard in most states.⁹⁵ That standard focused on several aspects of the land user's actions, including whether the land user had increased or decreased the property value.⁹⁶ This last factor came to be the most important.⁹⁷ Today, the majority rule is that "when a material change increases the value of the underlying property, the . . . owner generally has no recourse against the possessor."⁹⁸ In short, overall wealth maximization is the standard for ameliorative waste in most

89. Merrill, *supra* note 61, at 1072–73.

90. *Id.* at 1057–58, 1072.

91. *Id.* at 1072 (describing how the landowners sought damages in the amount of money that would be required to reconstruct the mansion).

92. *Id.* at 1057.

93. *Id.* at 1057–58, 1073–74. John Lovett emphasizes the changed nature of the neighborhood in his discussion of *Melms*. John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1214 (2007). He claims that this, not the economic value was the real deciding factor. *Id.* He further argues that there should be "greater toleration for allowing courts to readjust a property relationship to take into account significant and perhaps unanticipated changes in surrounding conditions," *id.* at 1220, as compared to "a mere increase in market value [which] alone might not justify allowing . . . fundamental changes," *id.* at 1214.

94. Merrill, *supra* note 61, at 1057–58, 1073–74; see also Sally Brown Richardson, *Reframing Ameliorative Waste*, 65 AM. J. COMPAR. L. 335, 370 (2017) (noting that *Melms* "shift[ed]" the focus of the ameliorative waste analysis away from the question of whether an alteration occurred and toward the valuation factor"). In line with her theory of the history of waste, Fraley argues that "[t]he better understanding is that *Melms* contributed to solidifying a trend that had already begun in the United States" that waste was no longer needed to police boundaries after the advent of advanced surveying technology. Fraley, *supra* note 82, at 913–14.

95. Merrill, *supra* note 61, at 1059; see also *id.* at 1081 (describing how this emerged as the "orthodox view" in the 1930s).

96. *Id.* at 1083.

97. *Id.* at 1059 (stating that "[i]n practice, economic value tends to dominate everything else" with regard to the nominally multi-factor standard).

98. Richardson, *supra* note 94, at 372; Purdy, *supra* note 62, at 676 (calling this the "American standard"). Compare, e.g., *Woodrick v. Wood*, No. 65207, 1994 WL 236287, at *1 (Ohio Ct. App. May 26, 1994) (allowing a building to be torn down when tearing it down increases the value of the property, representing the majority view of ameliorative waste), with Purdy, *supra* note 62, at 663 (noting that "[t]raditionally, it was no defense that a new building increased the value of the property"). A minority of ten states continue to hold to the view that any material alteration of a property is waste, no matter the change in value. Merrill, *supra* note 61, at 1083; see also RESTATEMENT (SECOND) OF PROP. (LANDLORD & TENANT) § 12.2 (AM. L. INST. 1977), Reporter's Note, item 5 (acknowledging the old common law rule that "any alteration of the premises which is injurious to the inheritance is not permissible even though it increases the value of the land" and calling for a reasonableness standard for alterations done by non-owners); RESTATEMENT (FIRST) OF PROP. § 140, cmts. a, f (AM. L. INST. 1936) (similar discussion and proposed rule).

jurisdictions.⁹⁹ Property users are permitted to knowingly make changes to property they don't own, so long as those changes increase the property's value.¹⁰⁰

III. A PUZZLE: BENEFITS BESTOWED BY WRONGDOERS

Even though *Melms* provides the benchmark followed in most states,¹⁰¹ debate still continues about whether the decision and its progeny created the right rule.¹⁰² This is for two reasons. First, the *Melms*-type rule only accounts for a wealth-maximizing conception of property, measured economically. Property also entails the right to exclude and idiosyncratic perceptions of value difficult to analyze based on market principles. And second, the law usually forbids wrongdoers from benefiting from their wrongdoing.¹⁰³ By allowing land users to violate landowners' right to

99. Richardson, *supra* note 94, at 337; *see also* Merrill, *supra* note 61, at 1088 (calling the default rule one in which land users are judged on whether they have “acted in the way an economically rational owner of an undivided interest in the property would have acted, [making] . . . the proper measure of property . . . measured by market prices”); Varadarajan, *supra* note 20, at 667 (defining ameliorative waste as the consideration of unauthorized improvement to a resource, “generally defined and measured by the increase in value of the resource attributable to the defendant’s efforts”). Varadarajan further notes that “analysis of improvement is specific to a particular parcel or chattel that is the subject of the dispute,” and the improvement “is measured in objective economic terms” based on the fair market value of the resource prior to and after the wrongful acts. *Id.*

100. Property owners can enjoin users *ex ante* from making such changes, but at least in majority rule jurisdictions, are unlikely to be able to recover damages *ex post* for value-increasing improvements.

101. However, as noted above, issues that were formerly governed by waste doctrine are mostly handled by contract today. Merrill, *supra* note 61, at 1084.

102. Merrill supports a return to the traditional common law rule because he believes the modern formulation “abandon[s] the idea of property as an individual right.” Merrill, *supra* note 61, at 1093–94. The common law principle also “minimize[s] ‘entitlement-determination costs’” by setting a clear rule compared to the flexible standard of value maximization. *Id.* at 1089 n.55, 1090. Judge Posner contests that the new rule has high entitlement-determining costs and points to the fact that valuation issues did not pose a problem in any of the cases Merrill cites. Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095, 1097 (2011). Posner also criticizes Merrill’s gloss on the common law rule—which would look to community standards or “normal owner behavior”—as being more vague than economic valuation. *Id.* at 1099–100. Unlike other commentators, Righetti and Schremmer argue that the waste cases show a “flexible and enduring standard” where courts can consider the “character and nature of the property, customs of the region, changes in technology,” as well as the intents and purposes of the parties. Tara K. Righetti & Joseph A. Schremmer, *Waste and the Governance of Private and Public Property*, 93 U. COLO. L. REV. 609, 629 (2022). Richardson’s viewpoint begins from a historical analysis of the Roman law of usufruct, from which she argues waste law derived. Richardson, *supra* note 94, at 338. She calls for a return to the Roman standard that forbids changes to the economic purposes of the property without looking at overall valuation—a standard that continues to exist in French and German civil law. *Id.* at 339, 362. She criticizes the economic value maximization standard on the grounds that property owners may not have the skills to run the more economically beneficial enterprise if and when property users depart. *Id.* at 374.

103. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 3 (AM. L. INST. 2011) (“A person is not permitted to profit by his own wrong.”); *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987) (explaining that defendants may assert the defense of unclean hands if plaintiff in a trademark suit has engaged in misconduct); *1-800 Contacts, Inc. v. Lens.com, Inc.*,

control their property—so long as they make value-increasing changes—*Melms* and its progeny permit land users to trample on landowners' right to exclude and thus allow wrongdoers to benefit from their wrongdoing.

This Part will explore these two issues with the modern ameliorative waste rule. It will then examine how they apply when considering the best way to fashion a rule for ameliorative infringement.¹⁰⁴ It also introduces a third constraint in the context of ameliorative infringement: trademark plaintiffs cannot receive penalty damages (those that go beyond compensation for the wrong done). As a solution to these three constraints, this Part proposes the concept of public interest damages. It then provides support for this solution with examples from three other areas of the law.

A. *Benefits Bestowed by Wrongdoers*

Often, a harm inflicted by a defendant is clear, and 100% harmful. A tortfeasor hits another person and breaks his or her arm. There is no benefit to the victim from having a broken arm; it is all harm.¹⁰⁵

Yet in some scenarios, wrongdoers bestow a benefit on those they also harm or whose rights they violate.¹⁰⁶ Ameliorative waste is an example of

722 F.3d 1229, 1255 (10th Cir. 2013) (same); *Pinkette Clothing, Inc. v. Cosm. Warriors Ltd.*, 894 F.3d 1015, 1029 (9th Cir. 2018) (explaining that plaintiffs may assert unclean hands defense to a defendant's assertion of a laches defense). To be clear, this section is particularly concerned with benefits bestowed by wrongdoers on the persons they wrong. It does not concern the possibility of spillover benefits to unconnected third parties from the wrongs between two people. See generally, e.g., Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1927–28 (2001) (discussing the danger of reviewing the benefits and drawbacks of every legal interaction in terms of its effects on third parties and other persons “still further removed”).

104. Another possible criticism of looking to ameliorative waste as a guide for ameliorative infringement is that ameliorative waste prescribes a rule for two parties with competing property interests, while in a trademark dispute, the trademark infringer does not have a property interest in the infringed-on trademark. This is of course true, but the trademark infringer does have a property interest in its own trademark—the allegedly infringing one. If the purportedly infringing mark is found to be infringing, then the infringer may lose its property interest in that mark completely, or at least to some degree. So in a very real way, a trademark infringement case is similarly a dispute between two parties with property interests. It is just the nature of the property interests at stake that are different.

105. Of course, in some circumstances, an act “tortiously injuring another benefits the tortfeasor. In such cases, the law has long recognized the right of the injured party to ‘waive the tort,’ foregoing his claim for damages and seeking instead restitution of the tortfeasor’s gain.” Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 504 (1980).

106. This is a subset of an area of a law that commentators have described variably as restitution, unjust enrichment, quasi-contract, and quantum meruit. See Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 65 (1985). Levmore notes that the general rule in this space is that restitution for non-bargained-for benefits is disallowed to prevent “overencouraged providers,” *id.* at 70, from intermeddling. *Id.* at 65, 70. However, if valuation of the benefit is not difficult and a court can create the missing bargain, some claims for non-bargained-for benefits will be allowed. *Id.* at 69. The most recent restatement describes the underlying principles of this area of the law by saying that:

this issue: a property user violates a property owner's rights by making changes to the property that the property owner did not want. But those changes increase the value of the property, bestowing (at least in an economic sense) a benefit on property owner.¹⁰⁷

1. *Benefits Bestowed by Wrongdoers in Contract & Tort*

The issue of benefits bestowed by wrongdoers also comes up in contract and tort.¹⁰⁸ For example, a person wants to add two rooms onto her house. She contracts with a builder for the work. The builder completes one of the rooms, but then breaches the contract and refuses to keep working.¹⁰⁹ The builder—a wrongdoer for breaching the contract—is subject to liability for the breach.¹¹⁰ But in most jurisdictions, contract law recognizes the doctrine of quantum meruit, even for breaching parties to the contract.¹¹¹ This allows breachers to recover for the value of the work they did complete—the benefit bestowed on the harmed party.¹¹²

In tort, the doctrine of comparative negligence accomplishes a similar purpose. A defendant can be the majority at fault for an accident. But the extent to which the defendant did the right thing—took precautions, prepared accordingly—can be understood as a benefit to those with whom

[T]he unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. . . . In determining net profit the court . . . may make . . . apportionments [and] may recognize . . . credits or deductions A conscious wrongdoer . . . may be allowed a credit for money expended in . . . carrying on the business that is the source of the profit subject to disgorgement. By contrast, such a defendant will ordinarily be denied any credit for contributions in the form of services

RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51(4)–(5) (AM. L. INST. 2011). *See generally, e.g.,* JOHN P. DAWSON, UNJUST ENRICHMENT (1951); HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004).

107. A separate line of cases concerns the “mistaken improver” of property they do not own. In these cases, similar to quantum meruit in contract, they recover for the value of the mistaken improvement. *See* Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1202 (1995).

108. *See, e.g.,* Levmore, *supra* note 106, at 67 (calling restitution the “crucial ground . . . [l]ocated at the intersection of tort and contract law” that shows an “asymmetry between the law’s treatment” of harms and benefits). “Restitution deals with nonbargained benefits; tort law with nonbargained harms; contract law with bargained benefits and harms.” *Id.*; *cf.* MERRILL, SMITH & BRADY, *supra* note 15, at 425 (describing restitution, torts, and contracts similarly); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. d. (AM. L. INST. 2011) (similarly comparing torts and restitution).

109. One way to contract around this possibility may be by having end-loaded pay arrangements, in which wages start low and increase as the project nears completion, with a large payout at the end. *See* Levmore, *supra* note 106, at 107–08.

110. *See generally id.* at 104–05 (describing three possible outcomes to this situation: substantial performance, denied recovery, and quantum meruit).

111. *See, e.g.,* Britton v. Turner, 6 N.H. 481, 487, 495 (1834) (enriched party obliged to pay reasonable worth of services received when breaching party left work two months before promised).

112. Recovery “cannot exceed the price at which a recipient was contractually entitled to obtain the benefit in question” because the “value of a benefit to the recipient [should be] the price he would pay in a voluntary transaction.” Kull, *supra* note 107, at 1203.

he interacted. The value of those precautions, a benefit bestowed on others, is recognized in tort by not charging defendant with 100% of a plaintiff's losses. Instead, comparative negligence discounts plaintiff's loss by the value that defendant's precautions were to no avail (because plaintiff himself was negligent or at fault for the injury). The correspondence is not perfect with the contracts example, but the issue, and the solution, are similar.¹¹³

In sum, in contract and tort, the wrongdoer is only punished to the extent of their wrongdoing. To the extent they did not do wrong—in building something they were supposed to, in taking sufficient precautions—they are not punished.

2. *Compensatory, Non-Punitive Damages as a Rationale*

Wrongdoers in tort and contract are punished only to the extent of their wrongdoing, and for good reason. Why? Because the law tries to fairly compensate plaintiffs for harms done. The value of the harm to plaintiff should be the value of a damages award. Otherwise, a victim receives a windfall.

To illustrate, suppose the plaintiff in the contracts example above were able to recover for the full value of the contracted labor. Plaintiff would twice receive the value of the first room of the house that was built by the breaching contractor—once as the completed physical structure, and a second time from the court in damages. Similarly, if there were no comparative negligence rule, a tort victim would be awarded damages beyond the harms done by defendant. He would be overcompensated.

The law does allow for these sorts of damages that go beyond compensating a plaintiff. But these damages—penalty damages or punitive damages—are usually reserved as punishment for exceptionally bad

113. Even without explicit comparative negligence arguments, courts sometimes police damages awards in torts cases to ensure that any benefits bestowed by wrongdoers are accounted for. In one such case, a tortfeasor negligently caused an old water tower to burn down, requiring the plaintiff to construct a new one. *United States v. Ebinger*, 386 F.2d 557, 560–61 (2d Cir. 1967). Famously, Judge Friendly reversed the trial court's damages award because it did not account for plaintiff's savings in periodic maintenance costs because of the new tower. *See id.* at 561. He ordered that these cost-savings benefits bestowed by the tortfeasor be accounted for to prevent over-compensating plaintiff, noting that:

The purpose of tort damages is to compensate an injured person for a loss suffered *and only for that*. The law attempts to put the plaintiff in a position as nearly as possible equivalent to his position before the tort. Recovery is permitted not in order to penalize the tortfeasor, but only to give damages "precisely commensurate with the injury."

Id. (emphasis added) (quoting *Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627, 631–32 (2d Cir. 1961)).

actors.¹¹⁴ Here, defendants who bestow benefits cannot, by definition, be exceptionally bad. Their actions must necessarily be less reprehensible than defendants whose actions cause 100% harm, with no benefit. And they certainly are less reprehensible than defendants whose actions cause 100% harm, with no benefit, and are exceptionally bad actors. So defendants who bestow benefits should not be penalized as if they were the worst of the worst.

3. *Benefits Bestowed by Wrongdoers in Property*

We have already seen how property handles at least one instance of benefits bestowed by wrongdoers: ameliorative waste. But as noted at the outset of this Part, property's treatment of ameliorative waste is still controversial. That controversy stems from the fact that there are at least two major conceptions of property, one of which is fundamentally different from contract and tort. Unlike tort and contract, which are often conceptualized solely in terms of economic value, property also is seen as an individual right to exclude. The conflict between these two major conceptions of property—the economic value model and the right-to-exclude model—creates the tension.¹¹⁵

On the one hand, allowing relief from liability for those who modify another's property flies in the face of property as an individual right, which functions as a binary switch. Either the person's right has been violated, or it hasn't. If it has, that's wrong, and discounting that wrong by any amount seems to negate the fact that it was wrong in the first place.¹¹⁶ On the other hand, property as a social institution to maximize value would counsel in favor of any attempts to increase a given property's total monetary worth. This viewpoint sees property in a numerical sense and allows for gradations of increases and decreases in value based on overall economic improvements and harms.¹¹⁷ Not giving credit for value-increasing use of property is an anathema to this system.¹¹⁸

114. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432, (2001) (calling punitive damages “an expression of . . . moral condemnation”); *BMW, Inc. v. Gore*, 517 U.S. 559, 575 (1996) (stating that the “most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct”).

115. Many commentators note this fundamental conceptual distinction. See, e.g., Merrill, *supra* note 61, at 1093–94; Posner, *supra* note 102, at 1100; Varadarajan, *supra* note 20, at 657–58.

116. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997) (holding that plowing a path through the snow on another's property after the property owners' refusal was trespassing and deserving of a punitive damages award, even though there were no compensatory damages awarded).

117. See, e.g., *supra* Part II (discussing the debate over ameliorative waste).

118. See, e.g., *supra* Part II.

Therefore, when it comes to the property version of benefits bestowed by wrongdoers, there is no portion of the benefit bestowed that is not also wrongdoing under the right to exclude conception of property.¹¹⁹ Every brick laid in a value-increasing structure on property that is not one's own violates the property owner's right to do as she wants with that property, from the very first brick on.¹²⁰ But, under the economic value conception of property, every brick laid that benefits the property owner is value given to the owner that should be compensated. This differentiates the ameliorative waste example—and by extension, the ameliorative infringement example—from the quantum meruit and comparative fault examples.

This conflict between the two conceptions of property ultimately sets up a face-off between the two bedrock legal principles just discussed.¹²¹ On the one hand, wrongdoers should not be permitted to profit from their wrongs. Again, in the property scenarios, there is no extent to which the infringement (or the waste) is not wrongful: every step of the way it violates the property owner's rights. To discount the harm done by the amount of a benefit intuitively negates on some level that a harm was done simply by the choice to infringe. It seems to allow wrongdoers to profit (in the form of a discount) for their wrongs.

Here, though, if the infringer bestows benefits, the plaintiff receives a windfall: the profits plus the commercial benefits are more than the infringer would have made on its own. Plaintiff is overcompensated, and the payment of excess damages to plaintiff over the actual level of

119. Cf. Calabresi & Melamed, *supra* note 21, at 1105 (differentiating property rules from liability rules). As explained by Varadarajan:

[A] property rule gives the property owner a veto over nonconsensual transfers; potential takers must get the owner's consent and pay the owner's price. A liability rule, by contrast, merely compensates the right holder for the violation; the owner has no veto power, and the nonholder can take the entitlement in exchange for a court-determined price.

Varadarajan, *supra* note 20, at 661. Varadarajan goes on to argue that "one would expect to see legal doctrines that excuse from liability an unauthorized improver . . . or, less drastically, mandate departure from a property rule in favor of a liability rule due to the fact and significance of her improvement." *Id.* at 659; see also Corgill, *supra* note 31, at 1931 (arguing that disgorgement in the context of property rights "is not compensatory," since a wrongdoer "may be required to disgorge gains that go beyond any injury" to the property owner, simply because of property's focus on exclusivity). Monetary remedies "shift[] the focus" from the property owner's injury to the nature of the wrongdoer's impermissible use. Corgill, *supra* note 31, at 1931.

120. Cf. Richardson, *supra* note 94, at 337 (in discussing ameliorative waste, pointing to the fact that the only injury the property owner suffers is the fact that her property materially changes without her consent).

121. Both of which may be exemplified by a quote from early Roman jurist Pomponius, depending on whose translation one takes. *Nemo debet locupletari aliena jactura* either means "no one should be made richer through another's loss," John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 621 (1981), or "nobody should enrich himself at the expense of another," Gergen, *supra* note 103, at 1927 n.1 (each translating the phrase differently). The first translation would counsel against a defendant benefiting from causing loss to a plaintiff. The second translation would mitigate against a plaintiff enriching himself (i.e., through a windfall) based on the efforts (expense) of defendant.

compensation owed serves as a penalty to the infringer. And trademark awards in particular cannot over-compensate plaintiffs because—as will be discussed further in Part IV—the statute proscribes penalty damages.¹²²

So, any solution to this puzzle must account for both of these principles. It must not overcompensate a plaintiff. But at the same time, it must not allow a wrongdoer to benefit from acts that are purely wrongful.¹²³

B. Public Interest Damages

Where does all this theory leave us, in the context of trademark damages? Essentially, with a pool of money which neither plaintiff nor defendant can rightfully receive. The value of the benefits conferred by a trademark defendant on a plaintiff cannot go to the defendant. That would allow a trademark defendant to receive a discount on damages for its wrongful infringement.¹²⁴ Defendant must pay in full.¹²⁵

But neither can a plaintiff—by law—receive an award that goes beyond compensating for its loss.¹²⁶ Benefits received by plaintiff due to infringement necessarily cut against the amount of any loss. So plaintiff cannot receive the full amount defendant must pay.

The difference between defendant's profits and the gains defendant bestowed on plaintiff through infringement thus cannot go to either party. How do other areas of law address these sorts of situations? Frequently, these damages are used to promote a fairer overall system. Defendant should therefore have its profits disgorged, but plaintiff should only recover the value of those profits minus that value of the benefits plaintiff received—

122. 15 U.S.C. § 1117(a). This will be discussed further in the subsequent section. *See infra* Section IV.B.

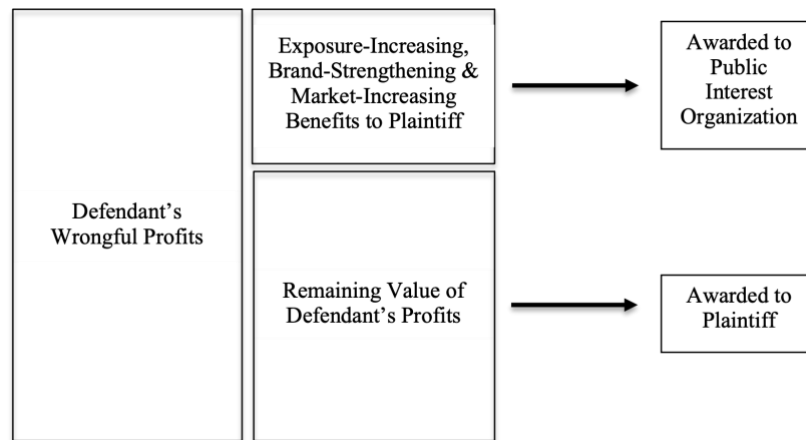
123. Again, as opposed to the situation in contract and tort, where the beneficial portion of a defendant's actions corresponds to non-wrongdoing. Rightful conduct and the benefit conferred go hand-in-hand in these situations.

124. This theory assumes that any encroachment on a trademark is wrongful, not just because of the economic value of loss but because theft is normatively wrong.

125. Although some might argue that it is "unjust impoverishment" for the defendant to be forced to pay more than the net value of the harm caused. *See generally* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936) (using the term "unjust impoverishment" in contrast with "unjust gain"). This counterargument might go that the "scope of a property right ought to be commensurate with the magnitude of the contribution underlying the right." Varadarajan, *supra* note 20, at 676 (citing ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 8 (2011)). If defendants contributed in some way to creating value for plaintiff's property right, then the scope of plaintiff's right should be limited (in this case, by discounting defendant's damages) to the efforts plaintiff undertook to build value in the right. This argument would see the damages paid by defendant as over-detering beneficial behavior. While this might be true in contract and tort in some instances, the very act of violating property rights must necessarily be seen as a harm and therefore not beneficial if both conceptions of property are to be accounted for.

126. 15 U.S.C. § 1117(a) (requiring damages awarded to "constitute compensation and not a penalty").

with the difference awarded in some way that supports the public interest.¹²⁷ These public interest damages could, for example, be awarded to a nonprofit that helps small businesses protect and enforce their IP rights.¹²⁸



This solution satisfies the two fundamental legal principles discussed above. It neither allows defendant to benefit from wrongdoing, nor does it give plaintiff a windfall. And while fully vindicating plaintiff's right to exclude—and the individual conception of property rights—it also supports the idea of property as a social good by seeking to compensate society as a whole for wrongs done.

At first glance, it may seem unorthodox to award damages to nonparties. However, this is not entirely unheard of. In the three examples below, nonparties are awarded damages as a way of trying to ensure broader societal fairness. Public interest damages in trademark cases would fall into the same category.

127. Essentially, the way this proceeds is (1) the defendant pays in full (2) if there is ameliorative infringement, that amount of damages is taken back from plaintiff in the form of an equitable offset. *See infra* note 180. This prevents defendant from paying punitive damages to plaintiff. But (3) the offset cannot go back to defendant, because of the equitable principle that no one should be able to benefit from their wrongdoing. *See, e.g., Ex turpi causa*, BLACK'S LAW DICTIONARY (12th ed. 2024). So (4) the equitable doctrine of *cy pres* kicks in, awarding the damages in the public interest. *See infra* notes 130–34 and accompanying text.

128. Another alternative might be to award the difference to consumers who *were* confused by the infringement, since they aren't compensated at all by a trademark lawsuit between plaintiff and defendant. But they likely do have other causes of action they could bring for damages, perhaps under unfair or deceptive trade practices statutes. And this wouldn't serve the purpose of recognizing the societal-level harm. *See infra* Part V.

1. Restitution in Criminal Cases

In criminal cases, wrongdoers are often required to pay restitution to those they've harmed. Victims are of course not parties to criminal cases. Nevertheless, restitution to those who have been harmed is central to many criminal defendants' punishments. The amount and beneficiaries of the restitution are carefully delineated based on losses by victims. For example, the Department of Justice has guidelines that require payments to have a "strong connection" to the violation at issue and be "designed to reduce the detrimental effects" of the harm done.¹²⁹ Public interest damages in trademark cases could follow these same principles by being awarded to nonprofits or other organizations that help small businesses secure and enforce their IP rights because this would provide stronger general deterrence to larger companies that might seek to infringe.

2. Cy Pres in Class Actions

Cy pres is an equitable remedy originating in trust law.¹³⁰ "In the class action context, *cy pres* refers to the practice of distributing settlement funds not amenable to individual claims or meaningful pro rata distribution to nonprofit organizations whose work is determined to indirectly benefit class members."¹³¹ Although *cy pres* settlements are a debated issue,¹³² they have been in use since at least the 1970s.¹³³ The nonprofits that receive *cy pres* portions of settlements are often selected by the parties' mutual agreement.¹³⁴ Public interest damages could follow this same pattern. They are damages not amenable to distribution to particular plaintiffs (lest the plaintiff receive a windfall), yet since defendant cannot keep them, they should be awarded to indirectly benefit those similarly situated to plaintiff and to prevent future similar harms. Like *cy pres* portions of settlements,

129. Memorandum from the Att'y Gen. to the Heads of Dep't Components U.S. Att'ys 3 (May 5, 2022).

130. Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 625–30 (2010); see also, e.g., *Cy pres*, BLACK'S LAW DICTIONARY (12th ed. 2024).

131. *Frank v. Gaos*, 586 U.S. 485, 490–91 (2019).

132. See, e.g., *id.* at 494–95 (Thomas, J., dissenting) (criticizing *cy pres* awards); Howard M. Erichson & Ethan J. Leib, *Class Action Settlements as Contracts?*, 102 N.C. L. REV. 73, 91 (2023) (pointing out that sometimes *cy pres* awards are directed to organizations to which "class counsel or defendants wish to direct money").

133. Asher A. Cohen, *Settling Cy Pres Settlements: Analyzing the Use of Cy Pres Class Action Settlements*, 32 GEO. J. LEGAL ETHICS 451, 455 (2019).

134. See, e.g., Order Granting Motion for Final Approval of Class Action Settlement; Granting Motions for Attorneys' Fees, Costs, and Service Awards; Judgment at 5, *In re Google Referrer Header Privacy Litigation*, No. 5:10-cv-04809 (N.D. Cal. Oct. 16, 2023).

public interest damages recipients could be selected by mutual agreement of the two parties.

3. *Split-Recovery Statutes for Punitive Damages*

Another mechanism by which third parties receive a portion of damages is through split-recovery statutes. Split-recovery statutes direct that some portion of any punitive damages awards goes to the state or another third party rather than to plaintiff.¹³⁵ For example, the Oregon split recovery statute sends sixty percent of any verdict awarding punitive damages to the state.¹³⁶ Why take this tack? One reason is to prevent windfalls to plaintiffs.¹³⁷ According to a state supreme court, without split-recovery statutes, plaintiffs are simply “fortuitous beneficiar[ies]” of punitive damages awards that should rightfully be spread more broadly.¹³⁸ Under the same logic, public interest damages would enable better protection of society as a whole from the type of harms defendant wrought, rather than over-award a single victim.¹³⁹

IV. A SOLUTION: FROM THEORY TO REALITY

The prior Part described how to theoretically arrive at the need for public interest damages and showed some related legal scenarios in which similar mechanisms have been tried. This Part shifts the focus from theory to reality. It examines the current trademark damages regime and discusses its shortcomings. It next briefly sketches what litigation awarding public interest damages might look like. Finally, it concludes by showing how the broad language of the statute, its openness to concepts borrowed from real and personal property, and its emphasis on crafting a fair outcome, support courts’ ability to award public interest damages.

135. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375–86 (2003) (discussing states’ split-recovery statutes).

136. OR. REV. STAT. § 31.735(1)(b) (2023).

137. Sharkey, *supra* note 135, at 376.

138. *Id.*

139. On the other hand, some argue that statutes such as these over-deter plaintiffs from bringing cases. Ashika David, *The Problem of State Split-Recovery Statutes: Why Punitive Damages Should Be Taxed as Windfalls*, 68 TAX LAW. 715, 717 (2015). By extension, an argument could be made that public interest damages in ameliorative infringement cases might have the same effect. But the law regularly creates or removes incentives to bring suits based on the quantity (or perceived quantity) of litigation. See, e.g., 31 U.S.C. § 3730(b) (allowing a private party to bring civil actions for violations of the False Claims Act). If there is an imbalance in favor of plaintiffs in reverse confusion cases—as judges have noted, see *supra* Part I, then a slight tip in the other direction in cases where there is ameliorative infringement may serve to correct that imbalance.

A. Current Regime

Damages for violations of the Lanham Act are governed by 15 U.S.C. § 1117.¹⁴⁰ If a violation is proved, plaintiff may be entitled to recover both defendant's profits and any damages sustained by plaintiff.¹⁴¹ In practice, these two remedies often merge: when parties are competitors, the defendant's profits are a "rough"—if not "the best possible"—measure of plaintiff's damages that are available to the parties.¹⁴²

The statute provides three clear rules for how these remedies should be assessed.¹⁴³ First, in seeking the remedy of defendant's profits, plaintiff is only required to prove defendant's sales;¹⁴⁴ defendant then has the

140. The Supreme Court's decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.* provides that for some statutory violations, these recoveries are possible even without willful infringement by a defendant. 590 U.S. 212, 219 (2020). But the court also cautioned that "a trademark defendant's mental state is a highly important consideration" in determining whether to award profits. *Id.* The Court also recently found that a defendant must have made infringing use of the mark in U.S. commerce to be liable; infringing conduct abroad that has an effect in the United States is not actionable. *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 428 (2023).

141. 15 U.S.C. § 1117(a). Winning plaintiffs are also entitled to costs and, in "exceptional cases," an award of attorney fees. *Id.*

142. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:59 (5th ed. 2017). To be clear though, plaintiff's damages—its *own* lost sales or profits—are a distinct concept from disgorging defendant's profits and are separate potential remedies that a court can award under the statute. *See* 15 U.S.C. § 1117(a). Disgorgement is an equitable remedy, and like all equitable remedies, is discretionary. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 553 n.103, 584 (2016). Disgorgement is further constrained in that it is usually only applied in the case of a conscious wrongdoer. *Id.* at 553 n.103. But conscious wrongdoing is not required under trademark law to prove a violation or even to receive disgorgement of a defendant's profits, although it is relevant. *Romag*, 590 U.S. at 219. So these principles of ameliorative infringement may not apply in all cases, especially those where there is not conscious wrongdoing—because these will often not call for disgorgement.

143. Many Circuit Courts have added various requirements to these statutory ones. *See, e.g.*, *Aktiebolaget Electrolux v. Armatron Int'l, Inc.*, 999 F.2d 1, 5–6 (1st Cir. 1993) (requiring the plaintiff to show in most circumstances actual harm and that the products compete directly); *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1540 (2d Cir. 1992) (assessing as one consideration "the degree of certainty that the defendant benefited from the unlawful conduct"); *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 175 (3d Cir. 2005) (looking at the "public interest in making the [defendant's] misconduct unprofitable" as a factor); *Synergistic Int'l, LLC v. Korman*, 470 F.3d 162, 175 (4th Cir. 2006) (applying the factors used by the Third and Fifth Circuits); *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 554 (5th Cir. 1998) (collecting six non-exclusive factors from various sources to assess the award of monetary relief); *Laukus v. Rio Brands, Inc.*, 391 F. App'x 416, 424 (6th Cir. 2010) (approving the use of the Fifth Circuit's factors); *Optimum Techs., Inc. v. Home Depot U.S.A., Inc.*, 217 F. App'x 899, 902 (11th Cir. 2007) (allowing damages when necessary to deter future conduct).

144. 15 U.S.C. § 1117(a). In some courts, the defendant must prove which sales, if any, are not attributable to infringement and therefore should not be counted. *Venture Tape Corp. v. McGills Glass Warehouse*, 540 F.3d 56, 64 (1st Cir. 2008); *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1408 (9th Cir. 1993), *abrogated on other grounds by SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016). In others, plaintiff must show which sales are attributable to infringement as part of the statutory sales-proof requirement. *Max Rack, Inc. v. Core Health & Fitness, LLC*, 40 F.4th 454, 472 (6th Cir. 2022); *Gucci Am., Inc. v. Daffy's, Inc.*, 354 F.3d 228, 242 n.15 (3d Cir. 2003). In either case, "the accounting period should be co-extensive with the period of infringement." MCCARTHY, *supra* note

opportunity to prove any cost or deduction from that gross sales figure to come to a profits number.¹⁴⁵ Second, the court may assess damages in the range from the amount of actual damages to three times that figure.¹⁴⁶ Finally—and crucial to this analysis—a court cannot use damages to assess a penalty to the infringer.¹⁴⁷

These rules are counterbalanced by an enormous amount of very explicit discretion. “If the court shall find that the amount of the recovery based on profits is either inadequate or excessive[,] the court may[,] in its discretion[,] enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.”¹⁴⁸ Seldom does a statute give this level of freedom to match a remedy to a wrong. If the profits remedy is too high or

142, § 30:70. Expert testimony and purchaser motivation surveys can be used to try to prove that the trademark only accounted for some, not all, of the consumer purchases, or that other factors played a role in purchase decisions. *See id.* § 30:65.

145. 15 U.S.C. § 1117(a); *see, e.g.*, *W. E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 664–65 (2d Cir. 1970) (allowing a defendant deductions for overhead, operating expenses, and taxes). Courts have allowed deductions for many costs, including the cost of goods, retailer discounts, and overhead attributable to the infringement. *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1077 (9th Cir. 2015) (allowing deductions for retailer discounts); *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 7–8 (2d Cir. 1989) (allowing cost of goods and some overhead attributable to the infringement, including “sales commissions, returns, samples and markdowns, shipping costs, interest on money borrowed from its corporate parent, and taxes”). Fixed costs and general overhead costs are not deductible. *See Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 941 (7th Cir. 1989) (denying fixed cost deductions); *Maltina Corp. v. Cawy Bottling Co.*, 613 F.2d 582, 586 (5th Cir. 1980) (denying overhead costs not attributable to the infringement). These calculations may be referred to special masters or magistrate judges. MCCARTHY, *supra* note 142, § 30:71. And at least in one circuit, district courts have discretion to subtract defendants’ losses in profitable years from defendants’ profits in profitable ones in determining an award. *See Burger King Corp. v. Mason*, 855 F.2d 779, 782 (11th Cir. 1988). *See generally* James M. Koelemay, Jr., *A Practical Guide to Monetary Relief in Trademark Infringement Cases*, 85 TRADEMARK REP. 263, 290–94 (1995) (collecting cases); *id.* at 288 (summarizing that the rules are “consistent with modern business school management theory”).

146. 15 U.S.C. § 1117(a). Courts try to be as specific as they can in assessing the extent of damages. *See, e.g.*, *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1221–23 (8th Cir. 1976) (limiting disgorged profits to profits from the states where market penetration was more than de minimis). Damages beyond the actual amount are extremely rare for an obvious reason: the statute requires that they not constitute a penalty. *Kars 4 Kids Inc. v. Am. Can!*, 8 F.4th 209, 224 (3d Cir. 2021) (stating that “granting an increase [above defendant’s profits] could easily transfigure an otherwise-acceptable compensatory award into an impermissible punitive measure” (quoting *Fifty-Six Hope Rd. Music, Ltd.*, 778 F.3d at 1077)). One setting in which such an enhancement may be permissible is to redress “an otherwise undercompensated plaintiff where imprecise damage calculations fail to do justice,” especially if “the imprecision results from defendant’s conduct.” *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991) (subsequent history omitted).

147. 15 U.S.C. § 1117(a). “It is anomalous to say that an enhancement of damages, which implies an award exceeding the amount found ‘compensatory,’ must be ‘compensatory’ and not ‘punitive.’” *Taco Cabana Int’l*, 932 F.2d at 1127. “When awarding profits . . . ‘Plaintiff is not . . . entitled to a windfall.’” *Lindy Pen Co.*, 982 F.2d at 1405 (quoting *Bandag, Inc. v. Al Bolser’s Tire Stores, Inc.*, 750 F.2d 903, 918 (Fed. Cir. 1984)); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 37(1)(a), cmt. e (AM. L. INST. 1995) (noting that “[a]n award of the defendant’s profits creates a potential windfall to the plaintiff and a potential penalty to the defendant”).

148. 15 U.S.C. § 1117(a). “[T]o avoid a windfall to the mark owner,” a court in some cases “may award its own estimate of what is a fair recovery”—even when the infringer “failed to produce evidence of either apportionment or cost deductions.” MCCARTHY, *supra* note 142, § 30:66.

too low, the court can enter a judgment of any figure that is “fair.”¹⁴⁹ Similarly, for the damages remedy, the court may take into account “the circumstances of the case.”¹⁵⁰

The fact that this entire analysis is “subject to the principles of equity” adds to a judge’s discretion.¹⁵¹ In *Romag Fasteners, Inc. v. Fossil Group, Inc.*, the Supreme Court interpreted this phrase extensively, saying that “[i]n the context of this statute, [principles of equity] . . . suggest[] fundamental rules that apply more systematically across claims and practice areas.”¹⁵² The Court termed these rules “transsubstantive guidance on broad and fundamental questions” rather than any formulation of “narrow rule[s]” about trademark law’s profits remedy.¹⁵³ This interpretation of “principles of equity” by the Supreme Court supports the idea that concepts from other areas of the law can be applied in assessing trademark damages, so long as the three concrete rules listed above are followed.¹⁵⁴

149. Damages may not be arbitrary or speculative, but so long as there is “data from which the amount of probable loss could be ascertained as a matter of reasonable inference,” *Broan Mfg. Co. v. Associated Distribs., Inc.*, 923 F.2d 1232, 1236 (6th Cir. 1991) (quoting *Agric. Servs. Ass’n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072 (6th Cir. 1977)), some courts will award lost profits, even without “precise calculations,” *Aronowitz v. Health-Chem Corp.*, 513 F.3d 1229, 1241 (11th Cir. 2008) (quoting *Ramada Inns, Inc. v. Gadsden Motel Co.*, 804 F.2d 1562, 1565 (11th Cir. 1986)).

150. 15 U.S.C. § 1117(a). One way judges take into account the circumstances of the case, for example, is by awarding reasonable royalty payment damages in cases where plaintiffs have licensed the trademark in the past. *Sands, Taylor & Wood v. Quaker Oats Co.*, 34 F.3d 1340, 1345 (7th Cir. 1994); *see also* *Bos. Pro. Hockey Ass’n v. Dallas Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 76 (5th Cir. 1979) (awarding reasonable royalty damages where the defendant had tried (and plaintiff rejected) a royalty-based license prior to infringement); *Koelemay*, *supra* note 145, at 282–83 (summarizing other types of damages plaintiffs have recovered based on existing or future business relationships).

151. 15 U.S.C. § 1117(a). McCarthy contends that this language also means that “an accounting of profits is never automatic and never a matter of right.” MCCARTHY, *supra* note 142, § 30:59. But the statute explicitly says that plaintiff “shall be entitled” to defendant’s profits and his own damages. 15 U.S.C. § 1117(a) (emphasis added). A textualist reading of the mandatory statutory language doesn’t seem to provide an option. A court could apply principles of equity to deny these remedies, but it would have to be explicit in its reasoning and the principles of equity applied. *Cf.* *Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 35 (1st Cir. 2002) (noting explicitly that if a court found that an injunction served as a complete and adequate remedy, then “the equities of the case may not require an accounting of profits”). However, multiple courts agree with McCarthy, finding that monetary (as opposed to injunctive relief) is not automatic and that the awarding of such relief is within a judge’s discretion. *See, e.g., Lindy Pen Co.*, 982 F.2d at 1405; *Quick Techs., Inc. v. Sage Grp. PLC*, 313 F.3d 338, 349 (5th Cir. 2002).

152. 590 U.S. 212, 217 (2020).

153. *Id.* For the identification and discussion of a similar trend of focusing on universal guidance versus field-specificity in patent law, see Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413 (2016).

154. Furthermore, other provisions of the Lanham Act support such a broad reading. For example, § 1115 discusses registration and defenses. It allows persons to raise “any legal or equitable defense or defect” against registered marks. 15 U.S.C. § 1115(a) (emphasis added). Again, the statutory language is broad and inclusive. In addition to all of this, the statute further empowers district judges to assess profits and damages “or cause the same to be assessed under its direction.” 15 U.S.C. § 1117(a). This second phrase appears to further widen the range of alternatives from which a judge can choose.

B. Shortcomings

Commentators have noted the shortcomings of the current trademark damages regime.¹⁵⁵ In particular, many argue that the practice of awarding damages based on defendants' profits has significant issues. Although there are some ways in which this may under-compensate plaintiffs, for the most part, these damages are seen as over-compensating.¹⁵⁶ The primary argument in this regard is that it is impossible to determine the precise amount of an infringer's profits that are attributable to the infringing trademark as opposed to the inherent value of the product (and, among other things, additional factors like better advertising placements). In line with this criticism, at least one commentator has argued that "[r]ather than a one-to-one correspondence, the infringer likely will sell more products than the trademark holder will lose."¹⁵⁷

An early Supreme Court decision weighed in on this issue. Noting the "impossib[ility]" of determining what portion of the sales is attributable to the infringing mark, the Court then stated that "[n]o one will deny that on

155. MCCARTHY, *supra* note 142, § 30:59 (commenting that the correspondence between defendant's profits and plaintiff's damages is "clearly imperfect" because "there is no reason to expect that every sale made by the defendant has been diverted from the plaintiff, or that the profit margins of the parties are necessarily the same"); Corgill, *supra* note 31, at 1920–21 (making same argument about profit margins). Corgill also points to the fact that disgorging profits during the infringing period does not account for future profits made by the defendant because it induced brand loyalty by using the infringing mark. *Id.* at 1920 n.52. Corgill also discusses how the creation of a trademark can be an expensive fixed cost for a company. *Id.* at 1938–41. So an infringer's copying avoids this fixed cost, which is not compensated as part of lost profits. *See id.* at 1940–41. *But see* ZAICHKOWSKY, *supra* note 39, at 2 (arguing that "[d]etermining exactly what makes a brand similar and desirable to copy is not always obvious" and may take time and effort as well). Finally, Corgill argues that the variation in product life cycles is not taken into account when computing lost profits. Corgill, *supra* note 31, at 1951–76. He proposes using the infringing company's internal estimates as benchmarks when computing damages, but acknowledges that there are theoretical and practical limitations to this solution. *Id.* at 1976–85. Varadarajan contends that the "fuzziness" of intellectual property boundaries leads to the "systematic overcompensation" of rights holders. Varadarajan, *supra* note 20, at 703; *see also id.* at 683–84. Forcing, for example, a large defendant company to halt its sales or pay damages on all its sales "disadvantages the defendant more than it benefits [rights holders]." *See id.* at 703. This "drive[s] settlement rates well above the 'benchmark' rate [that would be set] based on the value of the licensed right." *Id.*

156. *See, e.g.,* Pamela Samuelson, John M. Golden & Mark P. Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. REV. 1999, 2009 (2020) (noting that the rules are "plaintiff-friendly" when it comes to disgorgement of profits). "Awards under this total profit rule are generally on the high side, sometimes by a significant margin." *Id.*; *see also* Michael Grynberg, *Things Are Worse than We Think: Trademark Defenses in a "Formalist" Age*, 24 BERKELEY TECH. L.J. 897, 914–15 (2009) (suggesting that new trademark defensive doctrines may be needed because of the expanded scope of potential liability for trademark infringement).

157. Corgill, *supra* note 31, at 1920. This leads to the trademark holder's recovery being likely "calculated over a greater number of sales than those actually diverted because of the infringement." *Id.* Corgill reaches this conclusion because "[a]n infringer who enters a market with a typical, downward-sloping demand curve must offer a lower price to sell the additional quantity. Consequently, the infringer's sales result . . . from existing sales diverted from the trademark holder [and] from new sales induced by the lower price." *Id.*

every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the use of the trade-mark.”¹⁵⁸ But because this “cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant.”¹⁵⁹ A somewhat later decision put the issue more starkly. “There may well be a windfall to the trade-mark owner where it is impossible to isolate the profits which are attributable to the use of the infringing mark. But to hold otherwise would give the windfall to the wrongdoer.”¹⁶⁰

There is just one problem with this approach. The Lanham Act, passed after these decisions, specifically requires that any remedy awarded in a trademark case “constitute compensation and not a penalty.”¹⁶¹

158. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 262 (1916).

159. *Id.*

160. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 207 (1942). The dissent disagreed with this outlook. *See id.* at 209 (Black, J., dissenting) (complaining that “the effect of the decision” was to “grant a windfall to the petitioner and to impose a penalty upon the respondent, neither of which is deserved”).

161. 15 U.S.C. § 1117(a). Congress passed the Lanham Act decades after the Supreme Court’s decisions in *Hamilton-Brown* and *Mishawaka Rubber*, and the original act contained the language cited forbidding penalties. *See* Lanham Act, ch. 540, § 35, 60 Stat. 427, 440 (1946). But the language in these Supreme Court cases still continued to affect other judicial decisions. *See, e.g.,* *Marshak v. Treadwell*, 595 F.3d 478, 495 (3d Cir. 2009) (holding that the plaintiff “did not need to establish actual damages to justify the imposition of an accounting of profits—she needed only to show that an accounting was necessary to deter infringement”); *Burger King Corp. v. Mason*, 855 F.2d 779, 781 (11th Cir. 1988) (also relying on a deterrence rationale for accounting of profits). For example, relying on the legislative history of the act, the Ninth Circuit held that “those courts which treat an accounting solely as a method of compensating for the diversion of customers fail to fully effectuate the policies of the Act” to “have the effect of deterring future infringements.” *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 122–23 (9th Cir. 1968). It held that even if products did not compete with each other, “both the trade-mark owner and the buying public are slighted” and so an accounting of profits was called for. *Id.* at 123. This decision does not seem to ever have been corrected. On the other hand, the Second Circuit recognized that it was wrong to rely on *Mishawaka Rubber* to the extent that decision and Second Circuit precedent disagreed with the Lanham Act. *Banff, Ltd. v. Colberts, Inc.*, 996 F.2d 33, 35 n.1 (2d Cir. 1993) (“To the extent that *Mishawaka* is inconsistent with . . . the Lanham Act, it is no longer good law.”). Other circuits disagreed with the deterrence-only rationale for awarding profits. *See ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 968 (D.C. Cir. 1990) (Thomas, J.) (holding that “courts’ discretion to award these remedies has limits”). The court continued:

The unjust-enrichment theory, which emerged in trademark cases in which the infringer and the infringed were not competitors, holds that courts should divest an infringer of his profits, regardless of whether the infringer’s actions have harmed the owner of the infringed trademark. Awards of profits are justified under the theory because they deter infringement in general and thereby vindicate consumers’ interests. . . . [But] deterrence alone cannot justify such an award . . . lest the award become speculative or violate [§ 1117(a)’s] prohibition against punishment.

Id. at 968–69 (citations omitted); *see also* *Liu v. SEC*, 591 U.S. 71, 98–99 (2020) (Thomas, J., dissenting) (arguing that disgorgement of profits as a remedy is too far-reaching because of tracing difficulties). Commentators have also noted that the deterrence rationale does not make sense in light of the Act’s prohibition on penalties. *See, e.g.,* Corgill, *supra* note 31, at 1927–28. Similarly, European law

Compensating a trademark plaintiff for the harm done requires awarding the actual amount lost. Any award over and above the value of plaintiff's actual loss is—definitionally—no longer compensation. It is a windfall. It is a penalty. And that is exactly what the statutory language proscribes. A solution is therefore necessary to avoid this violation.

C. *The Solution in Practice*

Enter ameliorative infringement and public interest damages. After plaintiff and defendant put on evidence regarding lost profits, a neutral expert should be appointed to render an opinion as to any commercial benefits defendant bestowed on plaintiff.¹⁶² Some might argue this sort of evidence is inherently too speculative. But companies compute the commercial value of intangible assets all of the time, often with regard to the goodwill associated with a trademark.¹⁶³

Three possible types of benefits have been outlined above. To take one example, a neutral expert could potentially show that defendant's infringement strengthened the brand by putting on evidence that plaintiff was able to raise prices over what would be expected due to inflation during the term of the infringement. This—along with evidence of consumer sentiment—might be enough to prove that the infringing brand caused the infringed-on brand to be seen as higher quality and therefore demand a

in this area also seeks to “allow for compensation based on an objective criterion” while not “introduc[ing] an obligation to provide for punitive damages.” Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L. 195/17) 26.

162. Because neither plaintiff nor defendant would have any incentive to put on such an expert, another method of expert selection would have to be used. There are at least three potential ways this could be done. First, the court could appoint an expert. *See* FED. R. EVID. 706(a). Second, both parties could submit nominations or agree to an expert. *Id.* Both of these methods are explicitly permitted by the Federal Rules of Evidence. They also might be good ways to pick an organization to receive public interest damages, should those damages be awarded. Third, public interest organizations that believe the proceeding is one in which public interest damages should be awarded could move to intervene and put on an expert. *See* FED. R. CIV. P. 24(b). This would come with its own issues about bias, but it would also be a way to encourage the incentivized party to put forth its best evidence—a hallmark of the American legal system. Courts could even let multiple public interest organizations seek to intervene in the damages portion of the proceeding, each making arguments about why they best represent the public's stake in the matter.

163. *See, e.g.,* GORDON V. SMITH & SUSAN M. RICHEY, TRADEMARK VALUATION: A TOOL FOR BRAND MANAGEMENT (2d ed. 2013); Michael J. Freno, *Trademark Valuation: Preserving Brand Equity*, 97 TRADEMARK REP. 1055, 1057–62 (2007) (discussing valuation methods); *see also, e.g.,* Unicolors, Inc. v. Urb. Outfitters, Inc., 686 F. App'x 422, 425 (9th Cir. 2017) (authorizing testimony by a trademark-valuation expert); THOMAS R. DYCKMAN, MICHELLE L. HANLON, ROBERT P. MAGEE & GLENN M. PFEIFFER, FINANCIAL ACCOUNTING 392–93 (5th ed. 2017) (discussing the accounting treatment of goodwill, which includes the valuation of intangible assets like trademarks); Varadarajan, *supra* note 20, at 692 (calling the perception of valuation difficulties “unavoidable in the context of intellectual property” and pointing to the fact that valuations are nevertheless common as part of licensing negotiations and settlements).

higher price point. The difference between the expected price increase due to inflation and the actual price increase would be the value of the benefit to the infringed-on brand. That value would then be subtracted from plaintiff's recovery (but not what defendant must pay) and instead awarded to a relevant public interest organization.¹⁶⁴

The neutral expert could also provide other evidence, such as the fact that a plaintiff did not have the capacity to produce enough of the branded product or products to make the sales that were allegedly stolen.¹⁶⁵ This evidence could be for all or just a period of the duration of the infringement. Again, plaintiff's damages would be discounted accordingly, and that value awarded in the public interest.

These examples are just tentative sketches of the sorts of evidence that a neutral, court-appointed expert could put on to make ameliorative infringement arguments. Currently, in trademark damages litigation, plaintiffs must put on evidence of defendants' sales; defendants then have the opportunity to try to prove deductions from plaintiffs' evidence of sales in order to arrive at lost profits. Because trademark damages litigation already requires extensive factual discovery and presentation of evidence, it seems likely that a court-appointed neutral expert would not need much, if any, additional data to be able to perform her work of valuing any benefits defendants bestowed on plaintiffs.

This slight modification to the process would thus not cause a significant change in proceedings or substantial additional court time or effort. Law is a tradeoff between the search for truth and fairness and the constraints of time and resources. The costs of allowing a neutral expert to testify as to the benefits an infringed-on brand received are minimal compared to the gains in being able to truly assess how much harm a defendant caused and to fairly award a plaintiff—and the public—what each is owed.¹⁶⁶

164. How to pick such an organization could be a challenge—and has been for *cy pres* awards. See generally Scott Dodson & Joseph A. Grundfest, *The Missing Millions: Cy Pres in Federal Securities Class Actions*, 74 EMORY L.J. 1 (2024). Dodson and Grundfest propose two fixes to make the *cy pres* system more fair. First, they argue that parties should have to identify, and court approval should be required, for any recipients to receive *cy pres* awards. *Id.* at 33–34. Second, they propose a “next best” standard that litigants should have to meet. *Id.* at 32. These suggestions could also be applied in a modified form for awarding public interest damages.

165. This sort of evidence could be obtained in discovery. In current practice, plaintiffs obtain information about defendants' sales to use when presenting evidence for damages through, for example, questions in a 30(b)(6) deposition. See FED. R. CIV. P. 30(b)(6). If defendants refuse to produce sales data, some courts will allow reliance on “indirect and circumstantial evidence.” *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 973 (2d Cir. 1985). Defendants should be able to obtain similar evidence to show lack of sales capacity.

166. Additionally, the uncertainty injected by having a court-appointed expert involved in calculating damages might cause more parties to settle with each other after a fact finder determines that infringement took place. This would also serve the public interest because it would substantially reduce

D. Textual, Statutory, and Policy Support

What was just presented is an argument based on pragmatism and fairness for recognizing ameliorative infringement and public interest damages, rather than continuing to award what are effectively penalty damages in violation of clear statutory language. There are at least four more reasons to recognize these concepts.

First, ameliorative infringement should be recognized because it fits with trademark's penchant for incorporating longstanding property concepts into its doctrine (even though some debate the similarity between real and intellectual property). For example, many defenses in trademark litigation have evolved from property defenses. Abandonment, a longstanding property defense to conversion, is now a statutory defense to trademark infringement.¹⁶⁷ Another defense is priority: a defendant can demonstrate that it used its mark in commerce before plaintiff's first use of the mark.¹⁶⁸ The Lanham Act also explicitly states "[t]hat . . . laches, estoppel, and acquiescence, are applicable,"¹⁶⁹ all of which are other traditional property defenses. And courts regularly recognize these defenses in trademark actions.¹⁷⁰ Because these traditional property concepts have been recognized in trademark disputes, ameliorative infringement should be

court time and costs by eliminating litigation regarding what damages should be awarded. Furthermore, just the possibility of a court applying these principles of ameliorative infringement might deter some less-meritorious suits or cause parties to settle earlier in the litigation—for example, if a defendant can early on present compelling evidence of the exposure-increasing, brand-strengthening, and market-expanding benefits described in Part I. This would also be in the public interest, because it would save judicial time and resources and also improve the quality of infringement suits being brought.

167. 15 U.S.C. § 1115(b)(2) (stating that it is a defense "[t]hat the mark has been abandoned by the registrant"); 15 U.S.C. § 1127 (defining "abandonment").

168. See, e.g., *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1163 (9th Cir. 2013) (discussing the issue of priority). Although not discussed by other scholars, the defense of naked licensing may be a form of recognition for adverse possession in the trademark context. See, e.g., *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 515–20 (9th Cir. 2010) (evaluating the degree of actual control exercised over the trademark, similar to the elements of open, notorious, and hostile possession in adverse possession cases).

169. 15 U.S.C. § 1115(b)(9).

170. For example, every circuit has recognized a laches defense to infringement. *Oriental Fin. Grp., Inc. v. Cooperativa de Ahorro y Crédito Oriental*, 698 F.3d 9, 21 (1st Cir. 2012); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980); *Kars 4 Kids Inc. v. Am. Can!*, 8 F.4th 209, 220 (3d Cir. 2021); *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 300 (4th Cir. 2012); *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998); *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999); *Roederer v. J. Garcia Carrion, S.A.*, 569 F.3d 855, 858–59 (8th Cir. 2009); *Internet Specialties W., Inc. v. Milon-DiGiorgio Enters., Inc.*, 559 F.3d 985, 989–90 (9th Cir. 2009); *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523–24 (10th Cir. 1987); *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1141 (11th Cir. 2018); *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137–38 (D.C. Cir. 1985).

recognized as well, deriving from the property concept of ameliorative waste.¹⁷¹

Second, some of the reasons that courts began to recognize the benefits of ameliorative waste apply equally in the context of ameliorative infringement. As detailed above, courts and commentators pointed to improved surveying techniques and changes in surrounding landscapes as reasons for recognizing the benefits of waste.¹⁷² Similarly, changes in technology and consumer shopping behaviors have effectuated the possibility of benefits from infringement. Given this parallel, courts should adapt and recognize ameliorative infringement.

Third, it makes sense to apply a valuation-based approach to intellectual property in order to embrace the widespread improvement of society—perhaps even more so than it does to property’s other forms. Intellectual property is concerned with promoting broad social progress.¹⁷³ This consideration is not present to the same extent with other forms of property.¹⁷⁴

As noted above, trademark infringers may help popularize a new product, trend, or social concept through their infringing activity, thereby creating wider acceptance of it. The value of this progress, although done wrongfully, should in some way be taken into account if trademark law is to fully support innovation, encourage creativity, and move society forward.¹⁷⁵ And the proper way to take this into account is through payments to IP-focused nonprofits that benefit society as a whole, not just

171. One difference between ameliorative waste and ameliorative infringement is that there is a pre-existing legal relationship (usually between a landlord and tenant) in the context of ameliorative waste. Such pre-existing relationship does not exist between trademark plaintiffs and defendants. But other trademark defenses derived from property concepts don’t rely on this preexisting relationship for their validity. For example, a laches claim could arise in a property dispute regardless of whether the plaintiff and defendant had a pre-existing legal relationship. Instead, the translation of these defenses from personal and real property to intellectual property are founded on the nature of property as a unified concept.

172. See *supra* Section II.B.

173. Cf., e.g., U.S. CONST. art. I, § 8, cl. 8 (describing the purpose of what has been called the “IP Clause” as “[t]o promote the Progress of Science and useful Arts”—although this clause only applies to copyrights and patents—not trademarks—since it refers to “Writings and Discoveries”).

174. Relatedly, physical property is rivalrous and excludable in ways that IP is not, so traditional justifications for an exclusionary view of property like the tragedy of the commons do not apply. Lee, *supra* note 20, at 191–92.

175. See Varadarajan, *supra* note 20, at 659, 663–64 (arguing that “[g]iven the utilitarian focus of intellectual property law[,] . . . one would expect . . . improvement doctrines” to be recognized and that IP law must “strike a balance between rewarding the originator of a particular invention or creative work, without stymieing the ability of future innovators to create”). Trademark admittedly plays less of a role in this regard than do patent and copyright, which have stronger public-progress and creativity orientations.

individual plaintiffs.¹⁷⁶ Recognizing ameliorative infringement and public interest damages thus better reflects the purposes of trademark law.¹⁷⁷

Finally, the statute by its very text and structure creates a space for common-law reasoning. Begin by considering the specific language of the statute: giving the court “discretion” to make a “just” award based on the “circumstances of the case” (mentioned twice)—and all this “subject to the principles of equity”¹⁷⁸—which this nation’s highest court has interpreted as “suggest[ing]” resort to “fundamental rules that apply more systematically across claims and practice areas.”¹⁷⁹ A statute with broader textual language and a more expansive binding interpretation could hardly be imagined.¹⁸⁰

176. Some might argue that taking away damages from plaintiffs might disincentivize them from bringing trademark actions due to the costs of litigating. However, as noted above, the Lanham Act allows plaintiffs to recover the costs of their action, and in exceptional cases, attorney fees. 15 U.S.C. § 1117(a). So plaintiffs with strong cases will continue to bring actions, knowing they will recover not only what they lost but also what they paid to regain it.

177. Furthermore, while trademark law is a type of intellectual property, many commentators have argued that intellectual property should not be too strictly thought of as being directly analogous with other forms of property. *See, e.g.,* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1071 (2005) (calling the view that “intellectual property is just like real property” “erroneous”). Lemley goes on to note that “in another era we treated intellectual property as” a type of tort and that trademarks were once found in the Restatement of Torts. *Id.* at 1072. If one considers intellectual property less like property and more like torts, then a framework that accounts for benefits bestowed by wrongdoers should apply in a similar manner. Furthermore, even if there are analogies between patents and copyrights and real property, some have argued that these same justifications do not carry over to trademark law. *See, e.g.,* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1695 (1999). If trademarks are the least property-like type of intellectual property, then analogies to contract and tort laws’ treatments of benefit-bestowing wrongdoers may in fact be more fitting than those found in property law. This reasoning might suggest abandoning the ameliorative waste framework, *supra* Part II, and instead using quantum meruit and contributory negligence as guides, *see supra* Part III. Relatedly, both parties have property rights—albeit of differing kinds—when it comes to ameliorative waste. This is not the case for trademark infringement, where only plaintiff has property rights.

178. 15 U.S.C. § 1117(a).

179. *Romag Fasteners, Inc. v. Fossil Grp., Inc.*, 590 U.S. 212, 217 (2020). It is also worth noting that *cy pres* is an equitable principle and therefore particularly fitting to be extended to this context, like it has been for class actions. *See supra* notes 130–34 and accompanying text.

180. However, the statute does say that “the plaintiff shall be entitled . . . subject to the principles of equity, to recover,” potentially barring anyone who is not the plaintiff from recovering. 15 U.S.C. § 1117(a) (emphasis added). But there is still some ambiguity here: if the plaintiff’s recovery is “subject to the principles of equity,” then potentially the judge could equitably award a portion of the plaintiff’s recovery as public interest damages to someone other than the plaintiff. *Id.* Principles of equity allow all sorts of modifications to awards, including based on conduct potentially outside the scope of the case (for example, as could be the case with unclean hands). Subjecting the plaintiff’s recovery to the principles of equity therefore still allows a space for public interest damages. Furthermore, equitable setoff is a type of equitable remedy in which a court allows a setoff “based on principles of fairness.” *Equitable setoff*, BLACK’S LAW DICTIONARY (12th ed. 2024); *see also Setoff*, BLACK’S LAW DICTIONARY (12th ed. 2024). A setoff is a form of an offset, which exists in many legal contexts. *Offset*, BLACK’S LAW DICTIONARY (12th ed. 2024). For example, a plaintiff’s failure to exercise its duty to mitigate damages (an equitable doctrine itself) may result in an offset to recover. *See, e.g., Carrizales v. State Farm Lloyds*, 518 F.3d 343, 351 (5th Cir. 2008).

Next, think about the statute as a whole. Here, consider a continuum with two very different types of statutes on each end. On one end is a long, complex, and detailed statute, with multiple subsections and sub-subsections.¹⁸¹ The very structure of such a statutory scheme intentionally seeks to leave little discretion to judges—otherwise, why have such detailed rules. In interpreting such a legal scheme, the main method of analysis will be to look at the statutory language and interplay among the various sections and subsections. Linguistic heuristics and traditional tools of statutory interpretation will reign supreme.¹⁸²

On the other end of the continuum, there are statutes that intentionally create a space for common-law reasoning. They are usually short and provide only broad principles.¹⁸³ From their very structure, it is clear there is an intent to give judges freedom to employ fundamental legal principles and concepts to effectuate fairness on a case-by-case basis.¹⁸⁴ From there, common-law reasoning shapes the contours of the law.

Of course, common-law reasoning is possible for any type of statute. But this article argues that this second category of statutes, by their very nature, intentionally create a space for judges to have immense discretion to experiment and apply any relevant legal theory to the specific facts of a case. And the trademark damages statute, by instituting few firm legal rules and subjecting all awards to equity and the circumstances of the case, is just such a statute.¹⁸⁵ As such, the statute itself anticipates and encourages that new theories derived from fundamental legal concepts—such as the ideas of ameliorative infringement and public interest damages—will be tested in its domain.

V. A CONCLUSION: ONE MORE VIEW OF THE CATHEDRAL

“[W]hat appear to be private disputes among hucksters almost invariably touch the public welfare.”¹⁸⁶

The modest goal of this article is for readers to recognize that trademark infringement may, to some extent, be commercially beneficial and that the

181. Think of many of the statutes that make up the Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

182. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012).

183. Think of the Sherman Act, 15 U.S.C. §§ 1–7.

184. Cf. García, *supra* note 20, at 305 (arguing that “the narrower and more specific a statute is, the less likely it is to apply evenly and well to differently situated parties”).

185. Cf., e.g., Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 195–99 (2004) (comparing “micromanager statutes” to “delegating statutes” and calling the Lanham Act a delegating statute because “courts are entrusted with the continuing refinement” of trademark doctrine).

186. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1167 (1948).

value of such benefits should belong neither to defendant, nor plaintiff, but the public. The broader goal is to question why over-compensatory, penalty, or punitive damages are awarded to individual plaintiffs in the first place, when the public might be the rightful recipient of such damages. In short, it suggests a new type of rule: one that functions as a property rule against defendants and as a liability rule for plaintiffs, with the balance given to the public.

Then-professor (later Judge) Guido Calabresi and Doug Melamed's *One View of the Cathedral* is a legendary article within the legal academy.¹⁸⁷ It has and continues to spawn an entire body of scholarship and criticism.¹⁸⁸ One of its most famous contributions is its juxtaposition of liability and property rules. It provides efficiency and distributional rationales for each, depending on certain considerations.¹⁸⁹ In discussing the benefits of property rules—and in particular, why thieves should have consequences greater than repayment of what they stole—the authors argue that because the thief “not only harms the victim, [but also] . . . undermines rules and distinctions of significance beyond the specific case . . . we must add to each case an *undefinable kicker* which represents *society's need* to keep all property rules from being changed at will into liability rules.”¹⁹⁰

As the authors note, this “kicker” entailed in property rules—payment beyond market value—is largely for societal benefit, and specifically, for the purpose of deterrence. The law recognizes two types of deterrence: specific and general. If public interest damages are awarded in the way this article suggests, then the specific deterrence effect remains: particular infringing defendants cannot benefit from harms caused, in any way, shape, or form. They must pay in full. And the general deterrence effect also remains the same: other companies considering infringing will not do so if they see defendants pay large awards.

187. Calabresi & Melamed, *supra* note 21, at 1106–10.

188. See, e.g., Yotam Kaplan, *The Other View of The Cathedral*, 82 MD. L. REV. 479, 492–98 (2023) (surveying this subsequent scholarship). See generally *id.* (arguing for the superiority of property rules over liability rules because liability rules require determinations by potentially biased decisionmakers).

189. See, e.g., Calabresi & Melamed, *supra* note 21, 1110 (arguing that “the most common [rationale] for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation”); *id.* at 1121 (considering the distributional effects of an example); *id.* at 1110 (noting that often “once a liability rule is decided upon, perhaps for efficiency reasons, it is then employed to favor distributive goals as well”).

190. *Id.* at 1126 (emphasis added). In general, a property rule is one that protects an entitlement such that “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon . . . and [it] gives the seller a veto if the buyer does not offer enough.” *Id.* at 1092. Defining the value of the entitlement is in the hands of the seller, who may attempt to extract payment beyond market value. *Id.*

At the same time, public interest damages avoid the major complaint regarding penalty damages: that they overcompensate a specific plaintiff for no reason other than to broadly deter defendants. Instead, the public—who, as Calabresi and Melamed suggest, should benefit from deterrent efforts and for whom deterrence is levied—is rewarded.¹⁹¹

Public interest damages therefore provide a partial critique of *One View of the Cathedral*'s assumption of bilateral relationships in legal disputes. All of the examples provided in *One View of the Cathedral*, and all of the rules discussed, contemplate the assignment of entitlements between two parties. This is typical. This is what our legal training teaches us from day one: to identify the parties to the dispute. And almost always, there will be only two sides considered.¹⁹² The plaintiff and the defendant. The prosecution and the defense.

But of course, law does not function in a vacuum. Every legal case is embedded in a society. And that society, the public, is and should be considered a party to the action—and therefore, possibly deserving of an award.

Public interest damages better reflect this reality. They point to the fact that in every case, there are not just the parties litigating; there is also the real world that surrounds them, from which the case emerged. And there is also the world on the other side of the case. A world which the case will either make better or worse; more just or more partial.

Precedent certainly has its power. But even nonprecedential cases—decisions that aren't reported, opinions that aren't cited—have an immense impact on the communities from which the parties hale and to which they return. They set precedent in the sense that they define the contours of the parties' future worlds. All the ways the parties are changed by the case spill over to their families, friends, and communities (if they are individuals), and to the workers, managers, suppliers, and customers (if they are businesses). The public is always a party.

* * *

Calabresi and Melamed sought to use “models [to] generate boxes” rather than proceed by what they saw as the “ad hoc” approach of most legal

191. One thing that is missing is that plaintiffs may be less incentivized to bring such suits because they will no longer have the prospect of an oversized award. But this is not necessarily bad, because it will likely weed out suits that lack merit or that are being brought simply for the prospect of a large payout.

192. For a discussion of this concept in the context of tax law, see Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 617 (2016) (examining and critiquing the “traditional dyad” of the “taxpayer on one side and the government on the other”).

scholarship.¹⁹³ They did this so as to avoid “neglect[ing] some relationships” that their boxes, or categories, would bring to light.¹⁹⁴ This article seeks to add one more box to their analysis. That box is the public’s box, a reminder that law is inherently social, and we should treat it as such. Or at least, that is one (more) view of the Cathedral.

193. Calabresi & Melamed, *supra* note 21, at 1128.

194. *Id.*