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## Patent Infringement as Trespass

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# PATENT INFRINGEMENT AS TRESPASS

*Adam J. MacLeod\**

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## ABSTRACT

*The now-conventional account of patent law holds that infringement is a strict liability offense, meaning that intent is not an element of an infringement claim. This account heightens the apparent injustice of patent law's special knowledge problem, that as ambiguous descriptions of intangible resources, patent claims do not sufficiently make potential infringers aware of a patentee's right to exclude. Particularly in the age of so-called "patent thickets," clusters of patents of variable merit which are indistinguishable from each other and from prior art, strict liability for infringement seems rather hard.*

*These problems reflect a conceptual misunderstanding. When infringement is understood as a species of trespass, as it was long described in American law, the various aspects of infringement doctrine fall into place. Common law traditionally recognizes three forms of trespass. Together, those three forms explain all of infringement doctrine as a coherent whole and resolve the apparent injustices that seem problematic on the conventional account of infringement. They also suggest that traditional equitable maxims should be used to determine when injunctive relief is appropriate to remedy ongoing, willful infringement.*

## I. INTRODUCTION

Like pieces drawn at random from different jigsaw puzzle boxes, the various aspects of patent infringement law do not seem to fit easily together. Patent infringement is now conventionally viewed as a strict liability offense. On this view, one can infringe a patent without intending to affect a patent owner's rights, and without even any awareness of the patent's existence. Some pieces of infringement law, especially the first stage of the liability determination for direct infringement, seem to be cut on this pattern. Yet patent infringement is also a kind of wrong that the infringer commits against the patent holder, and the extent of damages and the availability of equitable relief are predicated upon the infringer's knowledge and intention. Various aspects of infringement law, especially defenses to a direct infringement allegation, contributory infringement liability, and the standards for pro-owner remedies such as punitive damages, follow this pattern. Patent infringement seems to be part strict liability tort and all common law wrong. The conventional account does not explain patent infringement as comprehensively as common law doctrines do.

The conventional account also heightens the apparent injustice of patent law's special knowledge problem, that as numerous, ambiguous, and

redundant descriptions of intangible resources, patent claims do not sufficiently make potential infringers aware of a patentee's right to exclude. The problem arises because there are so many patents we cannot know all their boundaries. Particularly in the age of so-called patent thickets, clusters of patents of variable merit which are indistinguishable from each other and from prior art, strict liability for infringement seems rather hard.

The legal structure of trespass also determines presumptions in equity. But if intellectual property is exceptional, rather than a type or species of property, then equity need not necessarily vindicate legal rights. The conventional account should lead us to depart from general rules in cases where it is impossible to know where property rights begin and end. The Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*<sup>1</sup> is supposed to have ameliorated the patent thicket problem in this way. Lower courts and many scholars interpret *eBay* to mean that in petitions for permanent injunctions against infringement, traditional equitable considerations such as notice and willfulness are now supplanted by a formulaic, four-part test which does not include the culpability of the infringer. But this four-factor interpretation of *eBay* does not solve the notice problem, and it deprives deserving patentees of equitable relief against intentional and culpable infringers.

Indeed, the conventional account leaves out what is most important about patent infringement to the parties who interact with patents. It arbitrarily excludes from consideration how patent owners and others who use patent estates for beneficial purposes view the justifications for infringement liability. Strict liability trespass is overinclusive; it includes nonharmful and nonculpable harms. Accordingly, that a nonowner has used, made, sold, or offered the invention raises a *prima facie* determination of infringement, but it does not determine liability or remedy. An accused has a right to assert innocence at the defense stage (e.g., by showing experimental use) and at the remedy stage (e.g., by showing that he stopped infringing when put on notice). Also, insofar as it holds that the trespasser's intentions are irrelevant, the conventional account cannot account for how the rights and duties of infringement operate upon the deliberations and choices of would-be infringers.

People who act with respect to patented inventions have, and act in consequence of, reasons that precede the economic consequences of their actions—rights and duties. Human beings act for reasons, including moral and legal norms that function as short-hand referents, or intermediate premises, within practical reason. And within juridical systems, people use legal reasons in their practical reasoning as they deliberate about what to do or not do. Whether because of information-cost efficiencies and human

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1. 547 U.S. 388 (2006).

frailty, or because it is in our nature to reason this way, those who act in response to legal norms and those who adjudicate cases employ legal reasons in their deliberations and choices.

Juridical concepts do real work in the deliberations and judgments of people acting in the world. So, we have pragmatic reasons to understand the non-pragmatic reasoning of those who act under law. Any analysis of patent law and changes in patent law, whether economic or social or on some other scholarly basis, starts with assumptions about which people count and what their rights and duties are. To the extent that those assumptions do not account for the way law appears and works from the perspective of those who act under law, any such analysis can miss important aspects of the phenomenon being studied.

So, the limitations of the conventional account have conceptual sources. When infringement is understood as a species of trespass, as it was long described in American law, the various aspects of infringement doctrine fall into place. Common law traditionally recognizes three forms of trespass. Together, those three forms explain all of infringement doctrine as a coherent whole and resolve the apparent injustices that seem problematic on the conventional account of infringement. Common law trespass doctrine also helps to explain the Justices' insistence in *eBay* that they were neither overturning patent infringement doctrine nor disturbing traditional equitable maxims.

After this Part, this Article proceeds with a brief explanation of methodology in Part II. Part III discusses the conventional account of direct patent infringement and the ways in which it resists fitting into the broader infringement puzzle. And it shows that traditional common law doctrines related to trespass fit infringement law in ways that the conventional account does not. Part IV orders the puzzle by reference to the doctrine of trespass at common law and the jurisprudential principles that animate trespass. It shows that patent infringement, like trespass, is not one phenomenon but three. Each of the three forms of trespass accounts for a stage in the specification of patent rights and remedies. Part V explains how a better ordered account of patent infringement as trespass can be cashed out to explain patent infringement as a coherent set of doctrines. And it explains why *eBay* should be interpreted not to abrogate patent rights and long-standing equitable doctrines. Part VI briefly concludes.

## II. TWO WORDS ABOUT METHODOLOGY

The terminology and structure of the Patent Act suggests that patent infringement is a species of trespass, and that is how it has long been

understood.<sup>2</sup> To examine the relationship between infringement and trespass, this Article draws upon two streams of scholarship about law, one of which is becoming better known and the other is still less well-known in law journal literature concerning intellectual property. These methods are not intended to supplant conventional, consequence-oriented interrogations of patent law but to complement them, to provide a different perspective, a point of view internal to the doctrine itself, which might reveal or explain aspects of patent infringement that are otherwise missed.

First, the picture is sketched out doctrinally by considering infringement as a species of common law trespass. Trespass at common law is not merely a strict liability infringement of the right to exclude, at least not in its core or essence.<sup>3</sup> As explained below, trespass doctrine is more complex, even pluralistic, in its treatment of intention. The law of property wrongs arises out of common law writs, including assize of novel disseisin, trespass, and trespass on the case.<sup>4</sup> Those writs issued to remedy wrongs committed against not only the right to exclude but all the rights, liberties, immunities, and powers of exclusive possession.<sup>5</sup> Only later in the history of common law did trespass doctrine distinguish the right to exclude from the other rights of exclusive possession.<sup>6</sup> And when in the eighteenth century Blackstone gave his monumental account of trespass doctrine, he distilled three concepts of trespassory wrongs, the latter two of which involve culpable intention.<sup>7</sup>

This doctrinal approach to patent infringement can complement consequence-oriented accounts in several ways. It reveals the contours of trespass and infringement doctrine as handed down through history and therefore gives us a clearer picture of patent law's presumptions and foundational structure. Of course, presumptions can be overcome and legislation changes legal doctrine. But insofar as the story of patent is a story of legal change over time, a better conceptual understanding of the

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2. See, e.g., *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 430 (1908) (referring to instances of patent infringement as "trespasses").

3. This Article makes recurrent use of the mechanism of focal or core meaning, which employs central cases. Focal meaning is a device in moral and legal philosophy that elucidates the most important, or essential, or central instance or aspect of a thing being studied. So, for example, Aristotle taught that the focal meaning of friendship is a desire for one's friend's well-being. A friendship of virtue is the central case. Friendships of utility, such as business partnerships, are friendships in a weaker, more peripheral sense. In a friendship of utility one takes into account the other's well-being not for the person's own sake but rather instrumentally, in order to achieve some objective that is external to the friendship itself. ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII, at 163–87 (Robert C. Bartlett & Susan D. Collins trans., Univ. of Chi. Press 2011) (c. 349 B.C.E.). For more on focal meaning and central cases, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3–21 (2d ed. 2011).

4. See *infra* Part IV.B.1.

5. See *infra* Part IV.B.1.

6. See *infra* Part IV.B.1.

7. See *infra* Part IV.B.1.

doctrines in earlier times can help to clarify in what respects the law has changed and in what respects it has not.

The search for conceptual coherence in the doctrine can also inform consequentialist accounts and prevent them from working on conceptual grounds that do not match the terrain being studied. In particular, whereas consequentialist accounts provide very detailed pictures of the parts, scholarship that recalls attention to legal doctrines and the concepts that are foundational to them helps situate those pictures within the whole in a way that prevents them from becoming reductionist. Indeed, much consequentialist scholarship refers to doctrinal concepts precisely as a way of recalling legal scholarship to a view of the whole. Some of that scholarship is discussed in Parts IV.C and V, below.

Second, this Article connects the three forms of trespass by situating them within the law of wrongs, which shows trespass to be a conceptual whole. In common law jurisprudence, wrongs are simply deprivations of rights.<sup>8</sup> Today, many people still think that law is a means of coordinating human efforts to achieve rational ends, and that the settling and specification of rights is the most granular or atomic level at which this coordination occurs. Law determines the jural relations—correlative rights and duties—that pertain between people as right holders and duty bearers. The consequences of human actions are the consequences of the choices of right- and duty-bearing beings. Therefore, those jural relations are best understood not only externally—in terms of actions and consequences—but also internally, from the perspective of those who have rights and bear duties.

The conventional account makes sense of actions and consequences, and can therefore account for those aspects of infringement (and trespass) that refer to “things” (defined here as resources that are owned, whether Blackacre or an invention) and the consequences of acting upon things. But to make sense of the actions of human beings who choose to act (or not) in response to rights and duties, the external perspective of the conventional account must be supplemented by the internal perspective of those rational agents. To make sense of trespass as a deprivation of a right—a wrong—this Article utilizes the tools of jurisprudence. It employs the tools of analytical jurisprudence to identify distinct jural relations that are implicated in an infringement dispute. And it identifies some first principles—basic, enduring, normative actualities about the human beings who interact with property and intellectual property—that cast light upon the rights and duties the violation of which makes patent infringement a legal wrong. Analytical jurisprudence and moral philosophy are regularly

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8. See *infra* note 147 and accompanying text.



employed to elucidate other areas of law,<sup>9</sup> including real property law,<sup>10</sup> but are not often used in intellectual property scholarship.<sup>11</sup> So a word more should be said in explanation of their use in this Article.

Jurisprudence can help paint a comprehensive picture of patent infringement insofar as patent infringement is a coherent doctrine. It does this work by showing how the parts fit together within the whole. Patent infringement might *not* be a coherent whole, in which case there is no picture to assemble. But it might be. And we ought not a priori rule out of bounds the methodological tools that could help us see its whole and its parts together without giving those tools a chance to do their job.

If infringement is coherent then some account of the parts and the whole can tell us something useful about it. Much as economic scholarship enhances our understanding of intellectual property law by revealing considerations that transcend particular rules and cut across doctrinal categories, one might learn something important about patent infringement by examining the first principles that transcend and animate trespass doctrines generally and which shape its particular rules.<sup>12</sup> This is not to deny that patent infringement is different in important respects from the common law of property (and torts). But it is to suggest that not everything one needs to know about patent infringement can be found in the text of the Patent Act, and that locating patent infringement within its legal and jurisprudential contexts might help us better understand the nature and boundaries of the pieces of infringement doctrines and how they fit together.<sup>13</sup>

This inquiry promises to clarify and make sense of infringement's more puzzling features, such as derivative liability, punitive damages, and the availability of equitable relief. For the jural relations comprising those features are in part shaped by cross-doctrinal first principles, especially moral respect for owners and their collaborators who are engaged in productive plans of action, and are in part contingent upon contextual considerations, especially the intentions of the relevant actors.

Readers who are familiar with jurisprudential methodologies will recognize this approach from analytical jurisprudence, the sort of

9. See, e.g., FINNIS, *supra* note 3; H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (Oxford Univ. Press 1999) (1975).

10. See, e.g., ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* (2015); STEPHEN R. MUNZER, *A THEORY OF PROPERTY* (1990); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); JAMES PENNER & HENRY E. SMITH, *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* (2013).

11. *But see* ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011); ADAM D. MOORE, *INTELLECTUAL PROPERTY & INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES* (2001).

12. I am grateful to Jonathan Barnett for this observation.

13. Compare how Ronald Dworkin's "philosophic" judge Hercules makes sense of law. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083–1101 (1975).

descriptive analysis associated with scholars such as Joseph Raz<sup>14</sup> and John Finnis.<sup>15</sup> Those accounts aspire to analyze and accurately describe the jural relations that people understand themselves to have. They view rights as specified and justified on the basis of correct evaluations of prior reasons, typically weighty interests and values such as human goods and universal principles such as equal concern and respect for persons.<sup>16</sup> This might raise concerns that I am smuggling a controversial conception of the good into what is supposed to be a neutral account of law. Such concerns would be misplaced for two reasons.

First, this account is self-consciously candid about the goods, rights, and other values and norms that are at stake. All accounts of law make, and rest upon some assumptions about what is valuable, and any of those assumptions can be controversial. Insofar as my account discloses its underlying understanding about what is essential to trespass, its a priori premises are available for examination and critique.

Second, though my methodology is analytical, I depart from pure analytical jurisprudence, or “perfectionism,” in significant, substantive ways. By pure perfectionists I mean those who maintain that rights are always conclusions of practical reasoning, properly specified as full, three-term jural relations only after a comprehensive consideration of the goods and requirements of reasonableness that are at stake.<sup>17</sup> I disagree. I think rights do real work in legal and judicial reasoning. Rights are often intermediate premises, approximations of what law requires, which are indispensable in an imperfect world of imperfect information and therefore mostly but not always absolutely and conclusively determinate. I have defended the coherence of that view elsewhere.<sup>18</sup> Indeed, I maintain that any account of law that purports to be comprehensive, especially perfectionist accounts, should have a place for rights and duties as premises

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14. JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

15. See FINNIS, *supra* note 3.

16. See, e.g., MACLEOD, *supra* note 10, at 20–32.

17. See generally GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 87–146 (2009); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127 (2008); John Oberdiek, *What's Wrong with Infringements (Insofar as Infringements Are Not Wrong): A Reply*, 27 LAW & PHIL. 293 (2008); Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209 (1995).

18. MACLEOD, *supra* note 10, at 173–96. To my defense of property rights as mid-level premises in reasoning about property law, compare Ted Sichelman's suggestion that “common law property, contract, and tort” can serve as “midlevel principles” in reasoning about patent law. Ted Sichelman, *Patents, Prizes, and Property*, 30 HARV. J.L. TECH. 279, 297 (2017). Sichelman defends a utilitarian, economics-based justification for patent law, but reminds his readers that “property and tort concepts may nonetheless play a useful role in practice, particularly when reasoning with those concepts reduces the information costs in adjudicating patent disputes and structuring patent doctrine.” *Id.* at 294–95.

that determine judgments, at least in part. For most of the law in the real world works that way.<sup>19</sup>

### III. INFRINGEMENT AND INFRINGEMENTS

#### A. *The Conventional Account*

As taught by the United States Court of Appeals for the Federal Circuit, the black-letter law of patent infringement reads simply and clearly. Though the Patent Act speaks of purposive actions that are performed by agents who are capable of deliberating and choosing—making, using, offering to sell, and selling<sup>20</sup>—patent infringement is a “strict liability offense.”<sup>21</sup> This is not a mere shibboleth but an entire doctrine. As the Federal Circuit explained in its landmark decision on the matter, “Intent is not an element of infringement,”<sup>22</sup> and neither innocence of intention, nor independence of invention, nor lack of actual awareness of a patent excuses infringement.<sup>23</sup>

This black-letter law is the centerpiece of the conventional account of patent infringement, which teaches that any action is an infringement which breaks the close of a patent or its substantial equivalent, without regard to knowledge of the patent, any intention to infringe, or any other culpable state of mind.<sup>24</sup> As one scholar has stated it, “One directly infringes a patent simply by making, using, or selling a product, or practicing a method that meets all the limitations of a patent claim. No fault is necessary.”<sup>25</sup>

The conventional account thus opposes patent law to the common law of trespass, which is a legal wrong. Adherents to the conventional view often explain this opposition by portraying patent rights as a concession of privilege granted and regulated by the government, rooted not in common

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19. *Id.*

20. 35 U.S.C. § 271(a) (2012).

21. *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1527 (Fed. Cir. 1995), *rev'd on other grounds*, 520 U.S. 17 (1997).

22. *Id.* at 1519.

23. *Id.* at 1523.

24. See, e.g., Michelle Armond, *Introducing the Defense of Independent Invention to Motions for Preliminary Injunctions in Patent Infringement Lawsuits*, 91 CALIF. L. REV. 117, 148 (2003); Tun-Jen Chiang, *The Reciprocity of Search*, 66 VAND. L. REV. 1, 10 (2013); Colleen V. Chien, *Reforming Software Patents*, 50 HOUS. L. REV. 325, 364–65 (2012); Rebecca S. Eisenberg, *Patent Costs and Unlicensed Use of Patented Inventions*, 78 U. CHI. L. REV. 53, 68 (2011); Christopher A. Harkins, *A Budding Theory of Willful Patent Infringement: Orange Books, Colored Pills, and Greener Verdicts*, DUKE L. & TECH. REV., Oct. 9, 2007, at 1, 12; Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1525 (2007); Michael N. Rader, *Toward a Coherent Law of Inducement to Infringe: Why the Federal Circuit Should Adopt the Hewlett-Packard Standard for Intent Under § 271(b)*, 10 FED. CIR. B.J. 299, 302–04 (2000).

25. Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575, 1576 (2011).

law but in federal positive law.<sup>26</sup> Because the government created patent rights, the government has power to set their terms and conditions to achieve its own ends.<sup>27</sup> Infringement liability is not for the remediation of wrongs but is instead one of patent law's tools for achieving its unique, extrinsic end of incentivizing innovation.<sup>28</sup> This account is said to have been the law "since the inception of the Republic."<sup>29</sup> It is so widely accepted that some recent scholars have characterized it as a "dogma,"<sup>30</sup> the first canon in the "catechism" of infringement doctrine.<sup>31</sup>

### B. *Common Law Fits Better Than the Conventional Account*

The conventional account hews closely to recent Federal Circuit dicta concerning direct infringement liability. But it does not fit easily within the whole picture of patent infringement law. For one thing, it does not fit the history of patent law. Strict liability is not as old as the Republic; its advent is rather quite recent.<sup>32</sup> Nor is it obvious that rights in inventions are entirely creations of positive law. The history of patents in Anglo-American law is instead a history of tension and conflict between a positivist conception of patents on one hand, grounded in prerogative and consisting of monopoly privileges, and on the other hand a common law conception of title in property,<sup>33</sup> grounded in custom and natural law and consisting of "property rights" held by inventors,<sup>34</sup> extended to them in exchange for their yielding up their secret innovations—their prepositive, common law property—to public view.<sup>35</sup>

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26. Mark A. Lemley, *Taking the Regulatory Nature of IP Seriously*, 92 TEX. L. REV. SEE ALSO 107, 107 (2013).

27. *Id.* at 108–10.

28. See generally Ted Sichelman, *Purging Patent Law of "Private Law" Remedies*, 92 TEX. L. REV. 517 (2014).

29. Lemley, *supra* note 24, at 1525.

30. Saurabh Vishnubhakat, *An Intentional Tort Theory of Patents*, 68 FLA. L. REV. 571, 578 (2016).

31. Lynda J. Oswald, *The "Strict Liability" of Direct Patent Infringement*, 19 VAND. J. ENT. & TECH. L. 993, 995 (2017).

32. *Id.* at 995.

33. So, for example, a challenge to the validity of a patent was characterized as an allegation of a "defect" in the patentee's "title." *Wallace v. Holmes*, 29 F. Cas. 74, 75 (C.C.D. Conn. 1871) (No. 17,100). And a share of patent ownership was described as a "moiety." *Whittemore v. Cutter*, 29 F. Cas. 1120, 1120 (C.C.D. Mass. 1813) (No. 17,600). Conversely, grants of real property were sometimes referred to as "patents." *Hansford v. Rust*, 150 S.E. 223, 223 (W. Va. 1929); *Caudill v. Bates*, 286 S.W.2d 922, 923 (Ky. 1955).

34. See, e.g., *Computing Scale Co. v. Nat'l Computing Scale Co.*, 79 F. 962, 965 (C.C.N.D. Ohio 1897).

35. See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1288 (2001) [hereinafter *Intellectual History*]. See generally Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007) [hereinafter *Constitutional Property*]; Adam Mossoff, *Who*

This matters because in various periods of American history, patents were viewed as property and the substantive law of infringement was not strict liability tort doctrine but the common law of trespass.<sup>36</sup> The law of trespass is more complex than today's conventional account of patent infringement.<sup>37</sup> So is the law of patent infringement. And they are both more complex than the conventional account in the same ways.

Most obviously, the conventional account does not even include the entire doctrine governing direct patent infringement liability. The "experimental use" and "prior commercial use" exceptions entail that some acts of using another's patent are not infringements because they are performed with an innocent intention. Someone making an experimental use is performing one of the actions—use—that is supposed to be unlawful without regard to intention. But liability does not attach because the user has a particular purpose and intention, either to satisfy their curiosity or to perform a philosophical experiment.<sup>38</sup> Similarly, some innocent infringers who made prior commercial uses, which would have entitled them to priority before the America Invents Act, are not liable.<sup>39</sup>

The common law of trespass to land has conceptual analogs for these exceptions. They are found in the doctrines of necessity and customary liberty, which except from trespass liability an unconsented entry upon tangible property where the entrant's purpose is to save a human life<sup>40</sup> or to exercise a prepolitical, customary or private right.<sup>41</sup> The conventional account has no such category because it does not allow the alleged infringer's intention to determine liability. So it must treat these doctrines as exceptions with no inherent connection to the purposes of the Patent Act.

Even if direct infringement liability were strict, derivative or secondary liability is imposed only on those who contribute to or facilitate direct infringement with the purpose to bring about an infringement.<sup>42</sup> The secondary infringer must possess some culpable mental state, either an

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*Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953 (2007) [hereinafter *Patent Privilege*]; THE FEDERALIST No. 43 (James Madison).

36. Adam Mossoff, *Introduction to INTELLECTUAL PROPERTY AND PROPERTY RIGHTS* (Adam Mossoff ed., 2013); Oswald, *supra* note 31, at 999–1005. See the cases listed in *Patent Privilege*, *supra* note 35, at 993 n.192–93.

37. See *infra* Parts IV–V.

38. See *Whitemore*, 29 F. Cas. at 1121; *Sawin v. Guild*, 21 F. Cas. 554, 555 (C.C.D. Mass. 1813) (No. 12,391); *Madey v. Duke Univ.*, 307 F.3d 1351, 1360–63 (Fed. Cir. 2002).

39. 35 U.S.C. § 273(a)(2) (2012); Robert P. Merges, *A Few Kind Words for Absolute Infringement Liability in Patent Law*, 31 BERKELEY TECH. L.J. 1, 38–41 (2016).

40. See, e.g., *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

41. See, e.g., *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244 (S.C. Constitutional Ct. App. 1818); Alan Blackshaw, *Implied Permission and the Traditions of Customary Access*, 3 EDINBURGH L. REV. 368 (1999).

42. *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1142 (7th Cir. 1975).

intention to induce another's specific act(s) of infringement,<sup>43</sup> or in the case of contributory infringement, knowledge that one's produced good is specially designed for an infringing use and incapable of any noninfringing use,<sup>44</sup> justifying an inference of specific intent to facilitate or contribute to infringement.<sup>45</sup> Thus, liability for inducing another's infringement "requires evidence of culpable conduct, directed to encouraging another's infringement, not merely that the inducer had knowledge of the direct infringer's activities."<sup>46</sup>

This might seem counterintuitive or even unjust in cases where the manufacturer of a device commonly used to infringe seems more causally responsible than the innocent user of the device.<sup>47</sup> As one proponent of the conventional account has put it, limiting infringement liability to acts of direct infringement would "sometimes let off the hook the party who most deserves to be held liable," and for this reason the Patent Act imposes liability on one who actively induces infringement.<sup>48</sup> Yet "the actual requirements for inducement liability have remained something of a mystery."<sup>49</sup> This is in part because courts cannot decide "what the inducer must know and intend in order to be liable for acting."<sup>50</sup> But the problem is more fundamental than that. As other commentators recognize, the requirement of a culpable state of mind is radically inconsistent with the conventional account of patent infringement.<sup>51</sup> If patent infringement liability is inherently strict then a robust intent requirement for contributory liability "throws the integrity of the system into question."<sup>52</sup>

By contrast, the common law of trespass can reconcile secondary infringement with our moral intuitions about culpability. While common law defines general trespass as any unconsented action that breaks the close, common law also justifies unconsented entry—declares it nontrespassory—when the entrant acts with one of enumerated, innocent

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43. See 35 U.S.C. § 271(b) (2012); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304–06 (Fed. Cir. 2006).

44. 35 U.S.C. § 271(c); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488–93 (1964).

45. See Charles W. Adams, *Indirect Infringement from a Tort Law Perspective*, 42 U. RICH. L. REV. 635, 661–62 (2008); Rader, *supra* note 24, at 312.

46. *DSU Med. Corp.*, 471 F.3d at 1306.

47. See Timothy R. Holbrook, *The Intent Element of Induced Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 399, 400–01 (2006); see also Dmitry Karshtedt, *Causal Responsibility and Patent Infringement*, 70 VAND. L. REV. 565 (2017).

48. Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225, 226 (2005).

49. *Id.*

50. *Id.*

51. See Mark Bartholomew, *Cops, Robbers, and Search Engines: The Questionable Role of Criminal Law in Contributory Infringement Doctrine*, 2009 BYU L. REV. 783; Lynda J. Oswald, *The Intent Element of "Inducement to Infringe" Under Patent Law: Reflections on Grokster*, 13 MICH. TELECOMM. & TECH. L. REV. 225, 245–46 (2006).

52. Oswald, *supra* note 51, at 245.

purposes, such as saving a human life or serving process, and assesses damages and other remedies on the bases of a culpable intention, all more or less consistent with reasonable senses of moral culpability. It seems unlikely that the conventional account of patent infringement can perform the same reconciliation.<sup>53</sup> Indeed, the conventional view seems to be that intellectual property law and the common law of wrongs rest on “very different rationales,” that the justification for intellectual property rights “clashes” with the moral principles justifying criminal and tort law, and that the law of patent infringement has little, if anything, to learn from the common law of trespass.<sup>54</sup>

That actions alone are supposed to determine direct infringement liability, without regard to intention, also complicates the problem of so-called divided infringement. In a case of divided infringement, several different persons or agents together cause a patent to be infringed, but none of them is liable for infringement because no single one of them has practiced all of the elements of the claim.<sup>55</sup> On the conventional account, the problem results from the Patent Act’s simplistic treatment of patent infringement as a single act by a single person.<sup>56</sup>

Here again, the common law provides a superior explanation. The common law of wrongs has means of apportioning responsibility for a

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53. Karshstedt makes an interesting attempt to square this circle. See Karshstedt, *supra* note 47, at 599–649. He proposes that we understand the manufacturer of the device used in the infringement to have caused the infringing act of the direct infringer. Cf. Bartholomew, *supra* note 51, at 827–45. That proposal is successful only insofar as Karshstedt takes on board the link between intention and causation, which requires us to hold as culpable all of the contributors to the wrong who *intended* to bring it about and to understand each of them as an independent agent who caused the wrong by acting for the reason of bringing it about. Compare Karshstedt, *supra* note 47, at 576 n.65 with H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985). For moral agents—persons—do not cause the voluntary actions of other moral agents in a way that is analogous to material or inexecutable causation. Voluntary moral agency—whether understood in classical terms as free will, in liberal terms as personal autonomy, or in perfectionist terms as practical reason—consists precisely in the capacity to choose and act, and to do so for reasons, whatever external powers or constraints might exercise a motivating influence on one’s choices and actions. See FINNIS, *supra* note 3, at 42–49, 126–27, 420–21; RAZ, *supra* note 14, at 369–429. See generally THOMAS AQUINAS, *COMMENTARY ON ARISTOTLE’S NICOMACHEAN ETHICS* (C.I. Litzinger trans., Dumb Ox Books 1993); 2 JOHN FINNIS, *COLLECTED ESSAYS* (2011). In every case of multiple causation, it is each actor’s reasons for acting that performs the work of justifying one in saying that the actor has caused the wrong in a legally significant sense, the sense in which one is culpable for one’s actions and should be held legally responsible. Thus, responsibility for secondary infringement cannot be reconciled with a notion of strict infringement liability at the level of principle, without more.

54. See Bartholomew, *supra* note 51, at 785.

55. Concerning the divided infringement problem, see also Stacie L. Greskowiak, *Joint Infringement After BMC: The Demise of Process Patents*, 41 LOY. U. CHI. L.J. 351 (2010); Nathaniel Grow, *Resolving the Divided Patent Infringement Dilemma*, 50 U. MICH. J.L. REFORM 1 (2016); Karshstedt, *supra* note 47, at 592–97; Mark A. Lemley et al., *Divided Infringement Claims*, 33 AIPLA Q.J. 255 (2005); and W. Keith Robinson, *No “Direction” Home: An Alternative Approach to Joint Infringement*, 62 AM. U. L. REV. 59 (2012).

56. Nathaniel Grow, *Joint Patent Infringement Following Akamai*, 51 AM. BUS. L.J. 71, 71–73 (2014).

trespass accomplished by concerted action.<sup>57</sup> Those means, especially what is now known as contributory liability, are consistent with the expressed desire of commentators to see culpable parties held liable and innocent parties protected from liability.<sup>58</sup> Common-law liability turns on an intention to achieve a shared,<sup>59</sup> wrongful objective,<sup>60</sup> namely together to perform the action that infringes the patent,<sup>61</sup> and does not pertain to one who lacks such an intention.<sup>62</sup> It is at odds with the conventional account of what patent infringement is,<sup>63</sup> but consistent with the actual law of infringement.

As in common law and equitable doctrines concerning trespass, intention is also relevant to remedy determinations in the patent context. For example, though a showing of intent is not required to establish direct liability, an infringer “is often not liable for *damages* until the plaintiff puts her on notice; at that point, she becomes liable only for damages arising from her subsequent conduct.”<sup>64</sup> Also, a showing of culpable intent is required to assess punitive damages.<sup>65</sup> A finding that infringement was “willful” justifies an award of treble damages.<sup>66</sup> This means “culpable

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57. *Thomson-Hous. Elec. Co. v. Ohio Brass Co.*, 80 F. 712, 721 (6th Cir. 1897); *Wallace v. Holmes*, 29 F. Cas. 74, 80 (C.C.D. Conn. 1871) (No. 17,100).

58. *Grow*, *supra* note 55, at 20, 36; *Lemley et al*, *supra* note 55, at 282–83; *Robinson*, *supra* note 55, at 66–67.

59. On the operation and implications of shared intention, see MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014).

60. *Cotton-Tie Co. v. Simmons*, 106 U.S. 89, 94–95 (1882). To be justified, the imposition of a legal disability such as infringement liability must follow the establishment of a culpable wrong. Legal liability for wrongs such as trespass tracks moral responsibility “because justice is achieved only if the morally responsible are held liable to punishment or tort damages.” MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 4 (2009).

61. *Cotton-Tie*, 106 U.S. at 94–95; *Thomson-Hous. Elec. Co.*, 80 F. at 721; *Barnes v. Straus*, 2 F. Cas. 876, 878–79 (C.C.S.D.N.Y. 1872) (No. 1,022).

62. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U.S. 425, 432–35 (1894).

63. For this reason, at least one commentator has proposed that Congress should amend § 271 to “fully reincorporate the traditional common law principles of contributory tort liability into the Patent Act,” especially concerning divided infringement. *Grow*, *supra* note 55, at 40. The proposed provision would hold one liable for infringement who “knowingly and collectively performs a patented process with another.” *Id.* That is consistent with the established common law doctrine:

[T]hat where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement and is equally liable to the patentee with him who in fact organizes the complete combination.

*Thomson-Hous. Elec. Co.*, 80 F. at 721.

64. Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 *BERKELEY TECH. L.J.* 799, 801 (2002).

65. *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996) (“Because increased damages are punitive, the requisite conduct for imposing them must include some degree of culpability.”).

66. 35 U.S.C. § 284 (2012); *SRI Int’l, Inc. v. Advanced Tech. Labs., Inc.*, 127 F.3d 1462 (Fed. Cir. 1997).



behavior.”<sup>67</sup> As the Supreme Court has explained, “The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.”<sup>68</sup>

Even with a finding of willfulness, a trial court has discretion over enhanced damages.<sup>69</sup> Nevertheless, the discretion bends toward enhancement in cases of culpable conduct. Trial courts may award punitive damages upon a finding of intentional infringement without any finding of objective recklessness.<sup>70</sup> Discretion is more curtailed where judges are inclined away from enhancing damages. Where willfulness is established as a matter of fact, a court should defer to a jury’s determination of culpability and must provide reasons for failing to enhance damages above compensation.<sup>71</sup> And according to an experienced practitioner, the “paramount factor” in a trial court’s decision whether to grant treble damages for willful infringement is “is the defendant’s culpable conduct or bad faith.”<sup>72</sup>

Just as culpable intention justifies an award of multiple damages, innocent intention can immunize an infringer from it. The Federal Circuit advises lower courts to take account of mitigating factors, such as independent invention, in rendering a finding of willfulness.<sup>73</sup> Indeed, evidence of independent invention or “good-faith attempts to design around patented technologies” can rebut evidence of willful infringement.<sup>74</sup> In this and in other respects, the divide between merely compensatory and punitive damages runs along the “[t]he boundary between unintentional and culpable acts,”<sup>75</sup> for damages are trebled where the infringer flouted the “requirement of law-abiding respect for the property of others.”<sup>76</sup> But if intention and culpability are irrelevant to infringement liability—if the conventional account is true—then it is not clear why they should be outcome determinative to the question whether one can be held liable to compensate the patentee once or thrice.

The conventional account rests upon other assumptions that dissolve upon close examination. It requires that independent inventors not be immune from infringement liability, even though independent discovery is

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67. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016).

68. *Id.*

69. *Id.* at 1931–32, 1934.

70. *Id.* at 1932.

71. *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1571–72 (Fed. Cir. 1996).

72. *Harkins*, *supra* note 24, at 17.

73. *SRI Int’l, Inc. v. Advanced Tech. Labs., Inc.*, 127 F.3d 1462, 1465 (Fed. Cir. 1997).

74. *Armond*, *supra* note 24, at 149.

75. *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1221 (Fed. Cir. 1995).

76. *Id.* at 1222.

permitted in copyright,<sup>77</sup> a body of intellectual property law that is supposed to rest upon similar creation-incentive justifications.<sup>78</sup> It presupposes that, at least in the patent context, trespass liability is justified on the basis of ends external to the rights vindicated and the wrongs corrected in a judgment of trespass, when in fact rights and wrongs determine judgments in patent cases.<sup>79</sup> And it misconstrues tort law. Even with respect to intentional torts, ignorance of another's legal rights is irrelevant, and the relevant inquiry concerns whether the trespasser intended to perform the action that the law declares to be trespassory.<sup>80</sup> In other words, the conventional account "is an unfortunate caricature of strict liability."<sup>81</sup>

Perhaps patent infringement is a sui generis form of strict liability. On the conventional account, direct liability for patent infringement has always been a unique statutory creation, while indirect infringement liability was long governed by common law.<sup>82</sup> Accordingly, conventional commentators suggest that the 1952 amendments to the Patent Act transformed contributory infringement from a trespass action governed by common law into an idiosyncratic action governed by (some unexamined jurisprudence of) statutory interpretation.<sup>83</sup> But this assumes a simplistic dichotomy between common law and positive law, not to mention a flawed conception of statutory interpretation. If infringement is in fact a species of trespass then Congress did not abrogate the common law of contributory liability in 1952; it codified it.<sup>84</sup>

It follows that the original Patent Act could just as plausibly have codified the common law of trespass for patent infringement generally. That Congress incorporated common law within the contributory

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77. Learned Hand gave the most famous statement of this doctrine in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936). "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." *Id.* at 54.

78. Blair & Cotter, *supra* note 64, at 809–12.

79. Cf. Eric R. Claeys, *On the "Property" and the "Tort" in Trespass*, in *THE PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 122 (John Oberdiek ed., 2014).

80. Vishnubhakat, *supra* note 30. *But see* RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965).

81. Vishnubhakat, *supra* note 30, at 573.

82. Oswald, *supra* note 51, at 227.

83. Mark Tomlinson, *Whodunnit? Divided Patent Infringement in Light of Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 7 J. BUS. ENTREPRENEURSHIP & L. 129, 131 (2013); Grow, *supra* note 55, at 7, 13–14.

84. *See* Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 485–86 (1964); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) ("The legislative history of the Patent Act of 1952 indicates that no substantive change in the scope of what constituted 'contributory infringement' was intended by the enactment of § 271."); Oswald, *supra* note 51, at 228–31; Rantanen, *supra* note 25, at 1593–96; *see also* *Metro-Goldwyn-Mayor Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934–35 & n.10 (2005).

infringement provisions in 1952 does not establish that *direct* infringement is a species of common law trespass. But neither does the absence of mention of common law in 1790 establish that it is not.

Either way, intention is an important consideration in patent infringement doctrine,<sup>85</sup> just as it is in trespass, except where Congress has chosen in clear terms to exclude it from consideration.<sup>86</sup> Congress's use within a statute of a term with a settled meaning in common law imports that meaning into the statute.<sup>87</sup> And the canon of charitable construction forbids courts to read positive enactments as abrogating common law absent a clear expression of legislative intention to do so,<sup>88</sup> in part because legislatures should not be assumed to have deprived people of their vested rights.<sup>89</sup> Therefore the inclusion within a federal statute of a common law term, without more, imports into the statute the scienter inherent in the doctrine that the term represents.<sup>90</sup> The Patent Act's repeated use of "infringe" (and its derivatives such as "infringes," "infringer," and "infringement"),<sup>91</sup> together with "owner" and "ownership"<sup>92</sup> and "personal property,"<sup>93</sup> where Congress assigned none of those terms idiosyncratic definitions,<sup>94</sup> commends a traditional understanding of infringement as common-law trespass against property rights.

### C. *The Notice Problem Cuts Both Ways*

The conventional account compounds patent law's special problem, known as the problem of "patent thickets." The metaphor is now used

85. Cf. Lemley, *supra* note 48, at 236 n.54, 241–45; Nat'l Presto Indus., Inc. v. W. Bend Co., 76 F.3d 1185, 1194–95 (Fed. Cir. 1996).

86. This seems to be the case as a practical matter, whatever the conventional account posits about the irrelevance of intention at the level of abstractions. One commentator reported that due to the important implications of a willfulness finding under the Patent Act, "almost every patent infringement suit charges willfulness." Ira V. Heffan, *Willful Patent Infringement*, 7 FED. CIR. B.J. 115, 139 (1997).

87. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 738–41 (1989); Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 455–57 (6th Cir. 2008); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 495 & n.104 (2013).

88. 1 WILLIAM BLACKSTONE, COMMENTARIES \*42, \*54, \*86–87, \*91, \*254; Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 49–62 (1911); Pleak v. Entrada Prop. Owners' Ass'n, 87 P.3d 831, 834–36 (Ariz. 2004).

89. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (2d ed., New York, O. Halsted 1832); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–1399 (4th ed., Boston, Little, Brown & Co. 1873); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

90. *Elonis v. United States*, 135 S. Ct. 2001 (2015); *Morisette v. United States*, 342 U.S. 246 (1952).

91. See, e.g., 35 U.S.C. §§ 271, 273, 281, 284 (2012).

92. See, e.g., 35 U.S.C. §§ 27, 41, 122, 123(b), (d), 134(b), 156, 257, 261, 262, 271, 273(d), (e), 289, 291.

93. 35 U.S.C. § 261.

94. See 35 U.S.C. § 100.

widely by courts<sup>95</sup> and commentators<sup>96</sup> to communicate the idea that the Patent and Trademark Office issues an excessive number of patents of variable merit, many of which are indistinguishable from each other and from prior art.<sup>97</sup> The thickets impede innovation by obscuring the boundaries between one patent and another, and between patented and unpatented inventions.

One of the factors contributing to the problem of patent thickets is patent law's notice problem, that patents do not provide adequate notice of property rights. Tangible resources signal ownership by possession, fencing, and other marking devices that put non-owners on notice of prior claims. Yet inventions, being intangible resources, do not by themselves signal knowledge of the patentee's ownership, and patents, being indeterminate, do not adequately signal the boundaries of the patentee's claim.<sup>98</sup> It follows that patents cannot function as property rights because no one can know what is and is not owned.<sup>99</sup> It is difficult to find the fences that divide one estate from another.

Not everyone agrees that patents fail to provide notice. Critics of the notice argument answer that it compares an apple to an "orange rind."<sup>100</sup> The specification of a patent claim is not analogous to a fence around land; it is analogous to the metes and bounds description in a recorded deed.<sup>101</sup> Patents are public records, which place nonowners on constructive notice of the inventions claimed in them much as recorded instruments of title do.

95. See, e.g., *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 719 (Fed. Cir. 2014); *Jaffé v. Samsung Elecs. Co.*, 737 F.3d 14, 17, 18–19 (4th Cir. 2013); *Proctor & Gamble Co. v. Paragon Trade Brands, Inc.*, 61 F. Supp. 2d 102, 106 (D. Del. 1996).

96. MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 31 (2008); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1614–15, 1627–30 (2003); Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165 (2011); Stephen R. Munzer, *Commons, Anticommons, and Community in Biotechnological Assets*, 10 THEORETICAL INQUIRIES L. 271 (2009).

97. See *Proctor & Gamble*, 61 F. Supp. 2d at 106.

98. See, e.g., JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 1–6, 46–72 (2008); Tun-Jen Chiang, *Fixing Patent Boundaries*, 108 MICH. L. REV. 523, 528–30 (2010); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 793–94 (2007); Michael Risch, *The Failure of Public Notice in Patent Prosecution*, 21 HARV. J.L. & TECH. 179, 187–89 (2007).

99. BESSEN & MEURER, *supra* note 98, at 46–72. Adam Mossoff calls this the "indeterminacy critique." Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1690 (2013).

100. Mossoff, *supra* note 99, at 1698. Mossoff points out that the difference between intellectual and real property resources can be overstated, for real property titles also fall prey to uncertainties. *Id.* at 1707–08. And that innovation companies have preclearance policies indicates that innovators often have constructive notice of patents even without actual knowledge of them. Both traditional equity principles and contemporary economic analysis suggest that infringement remedies should differentiate between culpable infringement, where preclearance is possible, and innocent infringement, where it is not. William F. Lee and A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385 (2016).

101. *Id.* at 1697–1700.

The imputation of knowledge by constructive notice is of course not unique to patent law. The same thing happens in real property law, where claimants fail in their bid to qualify as bona fide, good faith purchasers for value where a lawful record of an inconsistent quantum of estate is previously recorded.<sup>102</sup> And the problem of boundary confusion is very ancient; law and equity developed solutions to the problem a long time ago.<sup>103</sup>

However, the analogy between patents and real estate titles is not exact. Setting aside the efficacy of notice and issues arising out of patent ambiguity and volume, a well-functioning public patent record would go a long way toward closing the scienter gap between patent infringement and trespass to tangible goods, but not all the way. For there is a difference between encountering tangible property without knowledge of who owns it and encountering intangible property without knowledge that it is owned. What makes a tangible resource *not mine* is that I do not own it, while what makes a patent *not mine* is that someone else owns it. In cases of patent infringement, the duty is an obligation to exclude oneself from an invention that is owned by someone else. In trespass to tangible resources, the duty is to stay off this thing. To know that I am trespassing upon a tangible resource, it is enough to know that the thing does not belong to me. However, to know that I am infringing a patent, I must know: first, that there is a patent covering the invention and second, that the person whose rights I am exercising is not the lawful owner of that patent.

Nevertheless, patent law's special notice problem does not, by itself, have normative implications. Or rather, it cuts both ways. For the special problem presented by intellectual property is symmetrical. Just as an infringer can trespass upon the patent without knowing anything about the infringement, the patent owner can be equally ignorant, and for the same reason: there is no tangible resource to keep an eye on. As an earlier commentator remarked:

A patent right is the only property which can be trespassed upon without the owner's knowledge, in every part of the country, by an innumerable number of trespassers at the same time. The owner can neither watch it, nor protect it by physical force, nor by the aid of the police or of the criminal law. He thus necessarily requires

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102. THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 159–75 (2010).

103. See generally 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 609–623 (Boston, Little, Brown & Co., 12th ed. 1877).

more efficient civil remedies than those do the protection of whose property does not depend upon civil remedies alone . . . .<sup>104</sup>

The remark is exaggerated. Patent is not the *only* property prone to this danger, nor is it always so susceptible. But the basic point remains that the notice problem can reasonably be marshalled in favor of either greater or lesser patent protection, and therefore in favor of either a more or less stringent intent requirement.

Thus, Robert Merges has recently drawn upon the literature revealing “inadvertent plagiarism” during the communication of technological information to point to the “great gap between pure, unmediated invention and outright slavish copying.”<sup>105</sup> Patent infringement doctrine’s disregard of copying removes one disincentive to sharing and receiving information.<sup>106</sup> Because infringement doctrine makes evidence of copying irrelevant, researchers have no legal reason to guard against the receipt of other firms’ information.<sup>107</sup> In other words, the complexity of information transfer in the modern age provides a reason supporting the *prima facie* determination of liability for direct infringement without regard to intention.

The intangible nature of patents does not resolve the question whether direct infringement *should be* a strict liability offense. The intangible nature of a patent claim is a reason, but not a sufficient reason, to excuse innocent infringers. By the same token it is also a reason, but not a sufficient reason, to protect patent holders by imposing liability even upon innocent infringers. Reasons of incentives and efficiency—considerations that are more familiar in economic and utilitarian terms—and particularly the efficacy of our patent system for providing notice, are likely to be determinative. Those questions are empirical and beyond the scope of this study.

#### D. *The eBay Solution*

Either a patentee or a nonowner can exploit patent law’s special notice problem for inequitable ends. That is, patent rights can be wrongfully appropriated by a nonowner or exercised abusively by an owner or licensee, with an intention not to make productive use but rather to interfere with others’ productive plans. The best known examples of this are collectively known as “strategic patent litigation,”<sup>108</sup> in which

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104. James J. Storrow, *Money Recoveries in Patent Suits*, 13 AM. L. REV. 1, 1 (1878).

105. Merges, *supra* note 39, at 10–20.

106. *Id.* at 31.

107. *Id.* at 36–38.

108. Lemley & Weiser, *supra* note 98, at 784.

nonpracticing patentees pursue infringement actions against practicing entities to recover more than the harm they have suffered.

The Supreme Court's landmark ruling in *eBay Inc. v. MercExchange, L.L.C.*<sup>109</sup> is supposed to have addressed this problem. It is conventionally understood to have instituted a "discrete and well-defined 'test'" whose four elements exclude the culpability of the infringer, and which departs from traditional equity in other significant ways.<sup>110</sup> That is how lower courts have interpreted it.<sup>111</sup> Yet viewed that way, the ruling seems ill suited to address inequitable and exploitative conduct. An interpretation that views the decision as responsive to the problem would read the decision to uphold the traditional principles of equity,<sup>112</sup> in which intention plays a considerable role.<sup>113</sup> Equity should respond to and disincentivize inequitable conduct by either the patentee or the infringer, else it is not addressing the problem at its source.

The *eBay* case involved infringement of a valid "business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants."<sup>114</sup> The district court denied an injunction because the patentee was willing to license patent rights (to the infringer and others) and because the patentee did not practice the invention itself.<sup>115</sup> The Federal Circuit reversed, applying the established presumption in favor of equitable relief in cases of knowing infringement.<sup>116</sup> The Supreme Court then vacated the court of appeals's judgment and remanded to the district court, ordering it to apply the four-factor test<sup>117</sup> that is now widely used in other contexts to guide equitable discretion, and to make new findings.<sup>118</sup>

The meaning of the *eBay* decision is contested<sup>119</sup> in part because the case yielded three separate opinions. Justice Thomas, writing for the Court,

109. 547 U.S. 388 (2006).

110. Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 207–08 (2012) (punctuation omitted).

111. *Id.* at 214–19 and the cases cited therein.

112. *Id.* at 204–05.

113. *See infra* Part V.C.

114. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

115. *MercExchange L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003), *aff'd in part, rev'd in part*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006).

116. *MercExchange L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338–39 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006).

117. *eBay*, 547 U.S. at 394.

118. *See, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982).

119. The decision has been discussed in hundreds of scholarly articles. A very incomplete list includes David L. Applegate, *When "Exclusive" Is Not "Exclusive" and "Compulsory" Not "Compulsory"*: *eBay v. MercExchange and Paice v. Toyota*, 9 ENGAGE, June 2008, at 83; Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1 (2012); Eric R. Claeys, *On Cowbells in Rock Anthems (and Property in IP): A Review of Justifying*

chided the district court for concocting a categorical rule that a nonpracticing patentee who is willing to license practice rights to others is not entitled to injunctive relief.<sup>120</sup> And he faulted the Federal Circuit for “depart[ing] in the opposite direction from” equitable discretion when it established a presumption in favor of permanent injunctions, requiring district courts to grant injunctive relief except in exceptional circumstances.<sup>121</sup>

The concurring justices both would cabin equitable discretion. On Chief Justice Roberts’s account of the ruling, equitable relief should generally be available to a patent owner against an infringer in order to protect the right to exclude.<sup>122</sup> In this, Roberts adhered to the classical view that injunctive relief is appropriate to protect property rights, the very infringement of which constitutes an actionable harm.<sup>123</sup> By contrast, Justice Kennedy opined that the right to exclude by itself does not dictate a remedy, and proposed a general rule against injunctive relief where the patentee is not practicing the invention and the invention is a small component in a commercially valuable device.<sup>124</sup> In this, Kennedy adhered to the now-widespread view that nonpracticing patentees who engage in strategic patent litigation should not benefit from equitable relief.

In light of the differences, one might overlook what the three opinions held in common.<sup>125</sup> All three opinions in *eBay*—the Thomas opinion for the Court and the Roberts and Kennedy concurrences—adhered to what Justice Thomas called “traditional equitable considerations.”<sup>126</sup> Those are primarily the relative culpabilities of the parties.<sup>127</sup> Also, the justices all agreed that the lower courts had departed from traditional equitable considerations in some important way. None of the justices seemed to think that the issue whether to grant injunctive relief against an infringer could be resolved in a mechanical or formulaic manner in all cases. And finally, the Court upheld its 1908 decision in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*<sup>128</sup> That decision is a centerpiece of the doctrinal and conceptual puzzle, from which one can build out to doctrinal coherence.

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Intellectual Property, 49 SAN DIEGO L. REV. 1033, 1042, 1061–63 (2012); Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 CHAP. L. REV. 677 (2015); and Sarah R. Wasserman Rajec, *Tailoring Remedies to Spur Innovation*, 61 AM. U. L. REV. 733 (2012).

120. *eBay*, 547 U.S. at 393.

121. *Id.* at 393–94.

122. *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring).

123. *Id.* at 394–95; see also Claeys, *supra* note 119, at 1061–63.

124. *eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring).

125. See Holte, *supra* note 119, at 726–28.

126. *eBay*, 547 U.S. at 392.

127. See, e.g., *Heaton v. Miller*, 391 P.2d 653, 657–60 (N.M. 1964); *Malchow v. Tiarks*, 258 N.E.2d 811, 814–15 (Ill. App. Ct. 1970).

128. 210 U.S. 405 (1908).



## IV. DOCTRINAL AND JURISPRUDENTIAL ORDER

## A. Patent Rights: Use and Exclusion

*Continental Paper Bag* involved what would today be called a nonpracticing entity or, derisively, a “patent troll.”<sup>129</sup> The infringer argued that equitable jurisdiction was lacking because the patent was not used.<sup>130</sup> But the Court noted that the right infringed in the case was not the right to use but rather “the privilege of any owner of property to use or not use it, without question of motive.”<sup>131</sup> The Court expressed the classical view that a trespass upon the exclusion right of a patent is by itself an actionable injury justifying equitable relief. “From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation.”<sup>132</sup>

The Court in *Continental Paper Bag* did not say that the infringement of any patent right justifies equitable relief but rather that violation of the exclusion right presumptively does as a matter of course. Nor did it insist that the right to exclude is the only right secured by a patent or the only right enforced in equity. To the contrary, the Court engaged in an expansive discussion of patent rights, for it thought advisable “before considering what remedies a patentee is entitled to, to consider what rights are conferred upon him.”<sup>133</sup>

Citing *United States v. American Bell Telephone Co.*,<sup>134</sup> the *Continental Paper Bag* Court reiterated that a patent does not create the right to practice an invention; the right to use the invention precedes the patent, which only renders it a right of *exclusive use*.<sup>135</sup> In *American Bell Telephone*, the Court had explained the interaction of use and exclusion in patent law by contrasting invention patents and land patents.

The patent for land is a conveyance to an individual of that which is the absolute property of the Government and to which, but for the conveyance, the individual would have no right or title. It is a transfer of tangible property; of property in existence before the right is conveyed; of property which the Government has the full

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129. See Jay Dratler, Jr., *eBay's Practical Effect: Two Differing Visions*, 2 AKRON INTELL. PROP. J. 35, 48-49 (2008).

130. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 442 (1908).

131. *Id.* at 429.

132. *Id.* at 430.

133. *Id.* at 423.

134. 167 U.S. 224 (1897).

135. *Cont'l Paper Bag*, 210 U.S. at 424-25.

right to dispose of as it sees fit, and may retain to itself or convey to one individual or another; and it creates a title which lasts for all time. On the other hand, the patent for an invention is not a conveyance of something which the Government owns. It does not convey that which, but for the conveyance, the Government could use and dispose of as it sees fit, and to which no one save the Government has any right or title except for the conveyance. But for the patent the thing patented is open to the use of any one.<sup>136</sup>

After issuance of the patent, the right to use does not go away. It becomes enclosed within—surrounded and secured by—the right to exclude or, more precisely, *rights* to exclude anyone and everyone who would otherwise practice the invention. The patent then stands guard around a liberty to use (or not use) the invention, which is unaltered by the Patent Act except that it is now surrounded by a perimeter of exclusion rights. As the Court explained in *Continental Paper Bag*, in American law the “inventor’s own right to the use was not enlarged or affected by a patent.”<sup>137</sup> The right is a liberty because it entails no duties or obligations to exercise it in any particular way, or even at all.<sup>138</sup> This makes the usufruct in an American patent radically unlike an English letter patent granted through the royal prerogative, which carried with it a duty to make beneficial use of the privileged monopoly.<sup>139</sup>

On the conventional account, a patent entails only the right to exclude because the Patent Act grants only a “right to exclude.”<sup>140</sup> That does not necessarily follow. The right to exclude receives the most attention in discussions about patents because it performs the important but conflict-ridden work of securing the zone within which patentees and their collaborators do their good work. The liberties and powers at the core of patents enable the cooperation required to bring about new goods, new states of order and value in the world. The liberty to make beneficial use of inventions exists quite apart from patents, as trade secret and unfair competition law demonstrate. The liberty is also apparent from the language of the Act itself, which grants the right to exclude from exercising beneficial liberties to use—make, use, offer to sell, or sell—the

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136. *United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 238 (1897).

137. *Cont’l Paper Bag*, 210 U.S. at 425.

138. *Id.* at 425–30.

139. *Intellectual History*, *supra* note 35, at 1259–64.

140. 35 U.S.C. § 154(a)(1) (2012). For example, two noted intellectual property scholars state, “Patents do not actually provide an affirmative right to market an invention; they provide only a right to exclude *others* from doing so.” BESSEN & MEURER, *supra* note 98, at 4. This is ambiguous. If “provide” here means something like “grant” or “generate,” then the statement is true but misleading. If “provide” means something like “entail” or “include,” then the statement is plainly false.

invention.<sup>141</sup> The liberty to use the invention is from the perspective of owners and their collaborators (e.g., licensees) often the most important aspect of the patent estate.

In sum, the property of which a patent claim consists comprises more than just the right to exclude. Law and equity must tailor their remedies according to which right of the patent is at stake and the manner in which that right is being used or jeopardized. The patentee's liberty to use or not use the patent implicates more complicated considerations in equity than his right to exclude. The Court ruled that simple nonuse of the patent is not a bar to injunctive relief against an infringer but intimated that some types of unreasonable nonuse—nonuse for a wrongful purpose—might bar equity.<sup>142</sup> Both the use rights and the exclusion right (not to mention rights of alienation) are the patent owner's property and can be enforced by the remedies that are appropriate to them.<sup>143</sup>

Infringement is not a unitary phenomenon. It turns on different considerations depending upon what rights are at stake. In particular, patents secure *both* liberties of use and claim rights of exclusion (and other rights, such as powers of disposition). The point of infringement doctrine is to remedy those wrongs against rights, which differ in their determinacy and fungibility for compensable damages.

## B. Patent Wrongs as Trespasses

### 1. Plural Writs for Plural Trespasses

The picture becomes clearer when patent infringement law is placed within the broader framework of trespass. The plurality of patent infringements makes sense if infringement is a species of trespass, as long understood by courts<sup>144</sup> and scholars,<sup>145</sup> for trespass is also a variegated doctrine that turns on plural considerations and takes plural forms. Fortunately, the forms are not infinitely plural. They adhere to a certain pattern.

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141. 35 U.S.C. §§ 154(a)(1), 271(a).

142. *Cont'l Paper Bag*, 210 U.S. at 427–30.

143. *Id.* at 425 (“[P]atents are property, and entitled to the same rights and sanctions as other property.”).

144. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 997 (Fed. Cir. 1995).

145. See Alan N. Herda, *Willful Patent Infringement and the Right to a Jury Trial*, 9 TEX. WESLEYAN L. REV. 181, 198–99 (2003); Odin B. Roberts, *Contributory Infringement of Patent Rights*, 12 HARV. L. REV. 35, 40 (1898); Karen E. Sandrik, *Reframing Patent Remedies*, 67 U. MIAMI L. REV. 95, 95 (2012); Chauncey Smith, *Amendment of the Patent Law*, 12 AM. L. REV. 205, 213 (1878); Storrow, *supra* note 104, at 1.

The law of trespass—indeed the entire common law of wrongs—grew up within the writ practice of English common law.<sup>146</sup> The writs were not all created by positive enactments but rather grew out of common law practice in order to vindicate pre-existing rights and to remediate wrongs, i.e. the deprivation of rights.<sup>147</sup> As Blackstone explained, the private “wrongs that are forbidden and redressed” by the common law “are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*.”<sup>148</sup> Private wrongs are distinguished from public wrongs in that “the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanours*,”<sup>149</sup> which the crown has power to prosecute.<sup>150</sup> Yet both rights and wrongs are grounded in the same source—the vindication of the rights of persons either in their persons or with respect to things.<sup>151</sup> Property rights (and other rights) emerge to view as courts and legislatures declare them for the purpose of remedying their deprivation, either in general terms, good against the world, as by Parliament and legislatures, or specified in particular cases, as by jury verdicts and judicial decisions.

This is not to suggest that the writs fully determined common law rights and wrongs. The writs shaped the law,<sup>152</sup> to be sure, but they were shaped by demand for redress of wrongs, which were determined at least in part by reference to private rights. Rights are settled and specified prior to their declaration in court or Parliament. Common law jurists understood the rights and wrongs to be prior to and independent of the writ practice and

146. What follows draws heavily upon ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* (1986); SHELDON F. KURTZ, *MOYNIHAN’S INTRODUCTION TO THE LAW OF REAL PROPERTY* (5th ed. 2011); and FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (Boston, Little, Brown & Co. 1895).

147. See Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 46 *YALE L.J.* 1142, 1142 (1937); HOGUE, *supra* note 146, at 27–28, 161–63.

148. 3 BLACKSTONE, *supra* note 88, at \*1–2.

149. *Id.* at \*2.

150. 4 BLACKSTONE, *supra* note 88, at \*2.

151. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 215 (8<sup>th</sup> ed. 1915); 1 BLACKSTONE, *supra* note 88, at \*53–62; 3 BLACKSTONE, *supra* note 88, at \*1–11.

152. As the writ system gave way to rules-based practice, the writs for trespassory wrongs gave way to torts. See Eric Blaime, *Fundamentals of Tort Law*, NAT’L JURIS U., <https://nationalparalegal.edu/FundamentalsTortLaw.aspx> (last visited Feb. 9, 2018). But aside from the connection between trespass to persons and modern personal torts such as maiming and battery, it is difficult to trace lineages. The distinction between the writ of trespass and trespass on the case turned on whether force or direct contact were involved, Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 *VA. L. REV.* 359 (1951), whereas the modern distinction between trespass and nuisance is conventionally supposed to turn on whether the action alleged infringes the right to exclude or the right to use. MERRILL & SMITH, *supra* note 102, at 65–74, 192–93.

the judgments of court.<sup>153</sup> Rights and wrongs arise primarily from immemorial custom (also known as usage), acts of private ordering such as gift and devise, and natural law.<sup>154</sup> Judicial decisions and other sources of positive law are in the first place declaratory of pre-existing rights and wrongs and only secondarily directory toward those whom they govern.<sup>155</sup> Statutes either codify and declare the rights and wrongs of common law or remedy some defect in the common law's prohibition of wrongs and vindication of rights.<sup>156</sup> The "boundaries of right and wrong" are thus ascertained, not created or established, by courts in actions for redress of wrongs and by legislatures in statutes.<sup>157</sup>

The history of writ practice is a history of the Crown (generally acting either through Parliament or the Chancery)<sup>158</sup> developing and approving new writs when necessary to provide remedies for various wrongs. The writs of trespass were not the only writs available to remedy what we now call a trespass, and the various actions of trespass and trespass on the case covered more wrongs than what we now know as trespass. Trespass was originally conceived as a wrong against seisin—possession in its comprehensive sense, not merely exclusion—and was remedied by writs of assize and ejectment.<sup>159</sup> Under Henry II lawyers developed the writs of assize of utrum, novel disseisin, and *mort d'ancestor* to remedy wrongful dispossession, all of which were tried by a local jury.<sup>160</sup> The assize of novel disseisin was the proper action for possession of land disseised "unjustly and without a judgment."<sup>161</sup> Trespass by force certainly qualified for remedy by this writ, but so did repeated trespass.<sup>162</sup> Nor did assize jurisdiction require an actual entry. The assize of nuisance grew as a "supplement" to the assize of novel disseisin to reach cases of interference with use. Pollock and Maitland explained, "Law endeavours to protect the person who is seised of land, not merely in the possession of the land, but

153. 1 BLACKSTONE, *supra* note 88, at \*53–55; PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* xiii–xiv (2008); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1423–27 (1999).

154. 1 BLACKSTONE, *supra* note 88, at \*37–74; JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* 114 (1993); JAMES R. STONER, JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* 3 (2003).

155. *See* 1 BLACKSTONE, *supra* note 88, at \*53–55.

156. *Id.* at \*86–87.

157. *Id.* at \*53.

158. *See generally* 3 BLACKSTONE, *supra* note 88, at \*29–61.

159. HOGUE, *supra* note 146, at 27–28, 161–63.

160. *Id.* at 161–62.

161. 2 POLLOCK & MAITLAND, *supra* note 146, at 49–56.

162. While "[m]any mere trespasses" have counted as disseisins, "at all events repeated trespassing can be so treated." *Id.* at 53.

in the enjoyment of those rights against his neighbours which he would be entitled to were he seised under a good title."<sup>163</sup>

Trespass as infringement of the right to exclude came later, as the law came to distinguish ouster from injuries to property without ouster.<sup>164</sup> The writ of trespass *quare clausum fregit*, which is recognizable to modern eyes as trespass to real property, later issued against one who broke another's close "with force and arms and against the king's peace."<sup>165</sup> This writ was analogous to trespass *vi et armis*, for injuries to person perpetrated by force, such as assault and battery.<sup>166</sup> The writ was available not only to freeholders but also to termors, who were not required to allege seisin or title, only "that 'his' close has been entered and broken by the defendant."<sup>167</sup>

Then came trespass on the case. "Case" grew out of the thirteenth-century expansion of common law, which was borne of the "cooperation of the King's courts and the Chancery in trying to grant a remedy for almost every wrong presented for their consideration."<sup>168</sup> After the King's courts prevailed in their competition with local courts for judicial business, Parliament had to act to preserve the variety of forms of action. It enacted the Statute of Westminster II, one purpose of which was "to provide remedies for otherwise remediless plaintiffs."<sup>169</sup> The early "special trespass" actions remedied by case were alike only in that they were dissimilar from "general" trespass.<sup>170</sup> They included actions for negligence by a horse doctor and disturbance of an easement by ploughing of land.<sup>171</sup>

## 2. *The General Doctrine of Trespass*

Before the writ system had yet passed into history, Blackstone arrived to supply some conceptual coherence to the general doctrine of trespass. The concept he employed is recognizable today as the right to exclude. Blackstone taught that every entry that breaks another's close without consent is actionable, unless the person making entry could show cause.<sup>172</sup> Showing cause means showing a justification for entry, which renders the entry not a trespass.<sup>173</sup> Only certain, established categories of reason are

163. *Id.*

164. See 3 BLACKSTONE, *supra* note 88, at \*208–09.

165. 2 POLLOCK & MAITLAND, *supra* note 146, at 108.

166. 3 BLACKSTONE, *supra* note 88, at \*119–21, \*208–09.

167. 2 POLLOCK & MAITLAND, *supra* note 146, at 108.

168. Dix, *supra* note 147, at 1148.

169. *Id.* at 1149–50.

170. *Id.* at 1154–55.

171. *Id.* at 1155–57.

172. See 3 BLACKSTONE, *supra* note 88, at \*209.

173. *Id.* at \*212.

sufficient justification. Strict necessity to save a human life, exercise of a public accommodation license where the owner has no valid reason for exclusion, and customary rights such as gleaning by the poor after harvest, are among those that Blackstone identified.<sup>174</sup> Thus, at the liability stage of the analysis, an action that breaks the close raises the presumption of trespass, without regard to intention. The defendant's intention comes into consideration to justify the entry and overcome the presumption.

Intention returns at the remedy stage. In the course of explaining the rules assigning costs to disincentivize "trifling and vexatious actions of trespass," Blackstone introduced two additional concepts.<sup>175</sup> The plaintiff cannot recover costs where damages are nominal, unless "it shall appear that the trespass was wilful and malicious."<sup>176</sup> He explained, "Every trespass is *wilful*, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to be to harass and distress the plaintiff."<sup>177</sup>

The First Restatement of Torts carried forward Blackstone's conceptual framework<sup>178</sup> but muddied the liability determination by teaching that an "unintentional and non-negligent entry" is not a trespass.<sup>179</sup> The authors acknowledged that any act that caused an entry was a trespass at English common law, without regard to intention. "All that seems to have been required was that the actor should have done an act which in fact caused the entry."<sup>180</sup> The Second Restatement restored clarity by teaching that a trespasser is one who intends the action of entry, though he does not necessarily intend to trespass.<sup>181</sup> "One who intentionally enters land in the possession of another" is liable "although he acts under a mistaken belief of law or fact" that he has a right or privilege to be there.<sup>182</sup>

Regardless, Blackstone's basic conceptual framework persists in the law itself, including in the law of patent infringement. Innocence, whether defined as unintentional entry or intentional entry under mistake of fact or law, does not exculpate one who breaks the close without consent unless the defendant acted with an enumerated, justifying intention. But innocent

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174. *Id.* at \*212–14.

175. *Id.* at \*214.

176. *Id.*

177. *Id.* at \*214–15.

178. RESTATEMENT (FIRST) OF TORTS §§ 158–215 (AM. LAW INST. 1934).

179. *Id.* § 166.

180. *Id.* § 166 cmt. b.

181. RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965).

182. *Id.* § 164.

intention does mitigate damages,<sup>183</sup> just as malicious or intentional infringement of the exclusion right justifies enhancement of damages.<sup>184</sup>

Even after the writ system was replaced with petitions and pleadings, patents were routinely analogized to real property, and infringement was analogized to trespass.<sup>185</sup> So, for example, in 1888 the Supreme Court of the United States explained that infringement of a patent and the practice of patent rights under a contractual license are “two things totally distinct in the law; as distinct as trespass on lands is from use and occupation under a lease.”<sup>186</sup> It would therefore make sense to find Blackstone’s conceptual framework at work in the law of patent infringement.

### 3. *Trespass Without Breaking the Close*

As explained above, a patent is not *just* a right to exclude. And the doctrinal lineage of patent infringement suggests that one can be liable for infringement without breaking the close if one culpably injures some patent right other than the right to exclude. From early on, patent infringement was remedied by an action in trespass on the case.<sup>187</sup> Trespass on the case was the primary writ for redress of wrongs against use and enjoyment and against various servitudes and other usufructuary estates.<sup>188</sup> Those actions also persist to this day. One can trespass by causing indirect injuries, such as intangible invasions by vibrations and particles, which interfere with use and enjoyment.<sup>189</sup> And an easement can be trespassed upon though it does not entail the right of exclusive possession.<sup>190</sup> A trespass on an easement is a wrong committed by interfering with the easement’s use, without regard to whether the interference causes compensable harm.<sup>191</sup> And where the

183. *Hogg v. Emerson*, 52 U.S. (11 How.) 587, 608–09 (1850).

184. *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 159–62 (Wis. 1997).

185. *See, e.g., Eastman v. Bodfish*, 8 F. Cas. 269, 270 (C.C.D. Me. 1841) (No. 4,255); *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 10 F. Cas. 749, 750 (C.C.D.N.J. 1876) (No. 5,600). *See generally Constitutional Property, supra* note 35, at 701; *Patent Privilege, supra* note 35, at 992–98.

186. *United States v. Palmer*, 128 U.S. 262, 269 (1888).

187. *See, e.g., Hogg v. Emerson*, 52 U.S. (11 How.) 587, 588 (1850); *Parkhurst v. Kinsman*, 18 F. Cas. 1207, 1207 (C.C.D. Mass. 1847) (No. 10,761); *Stein v. Goddard*, 22 F. Cas. 1233, 1233 (C.C.D. Cal. 1856) (No. 13,353) (“The infringement of a patent is a tort; but as the wrongful act is not committed with direct force, and the injury is the indirect effect of the wrongful act of the defendant, the form of action is that description of tort called ‘trespass on the case.’”).

188. P.H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 189–92, 201–03 (1931).

189. *Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979); *Martin v. Reynolds Metal Co.*, 342 P.2d 790, 793–94 (Or. 1959).

190. *See, e.g., Chi. Title Land Tr. Co. v. JS II, LLC*, 977 N.E.2d 198, 203–06, 211, 216–20 (Ill. App. Ct. 2012). *See generally* 32 AM. JUR. PROOF OF FACTS 2D 389–438 (1982).

191. *Chi. Title Land Tr. Co.*, 977 N.E.2d at 216–20.



trespass upon the use is intentional or malicious, a court may assess punitive damages<sup>192</sup> and injunctive relief.<sup>193</sup>

#### 4. *Trespass Remedies in Equity*

Next, Blackstone's framework suggests that intention and culpability should be relevant, or even sometimes dispositive, in the determination of remedies. It is important to remember that common law jurists conceive of law and equity as distinct proceedings that vindicate the same rights, which are governed by the same general principles.<sup>194</sup> Law provides legal remedies for legal wrongs;<sup>195</sup> equity (known well into the eighteenth century as the province of the Chancellor, who was "keeper of the king's conscience")<sup>196</sup> exists to do justice where law falls short in vindicating those rights that are recognized in law.<sup>197</sup> It performs this work, as Story taught, "by requiring the defendant to answer, upon his conscience."<sup>198</sup> In both, the parties and the judge are bound in conscience to follow law.<sup>199</sup>

"Equity regards as done what in good conscience ought to be done."<sup>200</sup> This does not mean that equity enforces all moral obligations. Equity intervenes "in favor of such as have a right to pray that the acts might be done."<sup>201</sup> The corollary is that equity regards as *not* done that which ought *not* to be done.<sup>202</sup> Property rights impose upon would-be wrongdoers categorical duties, especially duties of abstention,<sup>203</sup> whether those duties correlate with rights to exclude<sup>204</sup> or with rights of use and enjoyment.<sup>205</sup>

192. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429–30 (1908); *Skelton v. Haney*, 777 P.2d 733, 734 (Idaho 1989).

193. *Skelton*, 777 P.2d at 734–35.

194. See generally STORY, *supra* note 103; 1 BLACKSTONE, *supra* note 88, at \*38–62.

195. STORY, *supra* note 103, § 1.

196. 3 BLACKSTONE, *supra* note 88, at \*47; Timothy A.O. Endicott, *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, 47 U. TORONTO FAC. L. REV. 549 (1989); Barry Gilbert, *The English Reports, 1292–1865*, 15 HARV. L. REV. 109 (1901); HOGUE, *supra* note 146, at 166–81.

197. STORY, *supra* note 103, §§ 1–37.

198. *Id.* § 1.

199. *Id.* §§ 1–37; see also 1 BLACKSTONE, *supra* note 88, at \*38–62.

200. *Carcione v. Clark*, 618 P.2d 346, 348 (Nev. 1980).

201. STORY, *supra* note 103, § 64g.

202. *Howe v. Varsity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994); *Travelers Ins. v. Lewis*, 531 P.2d 484, 485 (Utah 1975).

203. Duties of abstention are generally clear and universalizable. A great number of people in entirely different circumstances can all comply in the same way, i.e. by doing nothing. And they need not be context-dependent. What ought not to be done with respect to another's property is relatively determinate for everyone who is not the owner and who has no authority delegated by the owner. MACLEOD, *supra* note 10, at 197–205; John Finnis, *The Priority of Persons Revisited*, 58 AM. J. JURIS. 45, 53–54 (2013).

204. *Baker v. Howard Cty. Hunt*, 188 A. 223 (Md. 1936).

So, for example, equity will enjoin intentional waste that would sustain a trespass on the case but for which no adequate remedy exists in law.<sup>206</sup>

Though the powers of law and equity are merged in American courts of general jurisdiction, until recently courts distinguished between trespass actions brought in law and those brought in equity, usually pleading for injunctive relief, but applied the same principles to both.<sup>207</sup> The reason is that equity must take care to vindicate legal rights rather than to usurp them.<sup>208</sup> It must mind its place lest it lose its grounding in legal justice and destroy the law.<sup>209</sup> Equity seeks to vindicate legal rights without abrogating any of them—including rights of exclusion<sup>210</sup> and of use<sup>211</sup>—leaving some duties of *natural* justice unenforced and harsh implications of law unmitigated in order to perfect *legal* justice,<sup>212</sup> which law serves imperfectly as a result of its generality and the limitations of the words in which it is expressed.<sup>213</sup>

### C. Jurisprudence: Different Infringements From Different Perspectives

#### 1. Analysis of a Patent Dispute

A similar differentiation among senses of trespass and infringement can be perceived using the tools of analytical jurisprudence, especially Wesley Hohfeld's influential scheme of jural relations.<sup>214</sup> We can begin with a simple case of alleged infringement and break it down into its

205. 2 STORY, *supra* note 103, § 913; *see, e.g.*, Kane v. Vandenburg, 1 Johns. Ch. 11, 12 (N.Y. Ch. 1814); Palmer v. Young, 108 Ill. App. 252, 256–57 (1903).

206. Lancaster County v. Fitzgerald, 104 N.W. 875, 876 (Neb. 1905).

207. *See, e.g.*, Computing Scale Co. v. Nat'l Computing Scale Co., 79 F. 962 (N.D. Ohio 1897).

208. STORY, *supra* note 103, §§ 8–11.

209. 2 STORY, *supra* note 103, § 1112. This problem has been well known since Aristotle discussed it. ARISTOTLE, *supra* note 3, at 111–13. The most influential modern statement comes from Blackstone, who observed,

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.

1 BLACKSTONE, *supra* note 88, at \*61–62.

210. *See, e.g.*, Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 430 (1908).

211. *See, e.g.*, Chi. Title Land Tr. Co. v. JS II, LLC, 977 N.E.2d 198, 216–17 (Ill. App. Ct. 2012).

212. 1 STORY, *supra* note 103, §§ 11–16.

213. ARISTOTLE, *supra* note 3, at 90–114; 1 BLACKSTONE, *supra* note 88, at \*61–62; STORY, *supra* note 103, §§ 3, 6–7.

214. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS (Walter Wheeler Cook ed., 1923); Leif Wenar, *Rights* § 2.1, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/rights/> (last updated Sept. 9, 2015).

constituent rights and duties. This reveals many of the jural relations implicated by a typical patent, which in turn reveals the different ways in which one can commit a wrong with respect to a patent.

Every judgment of infringement, like every other judgment of trespass or other wrong, is grounded at its most basic level in three elements, which together form a simple jural relation. There is a person whose right was infringed, a person who had a duty not to infringe, and an action (or omission) performed by the duty-bearer which violated the duty. When this jural relation is broken down to its atomic level, it can be summarized using the formula: Trespasser (*T*) violated his duty not to perform action *x* with respect to Owner (*O*), or  $T \rightarrow \text{not } x \rightarrow O$ .

A jural relation consists of the same three terms no matter how one views it. To say that *T* had a duty not to perform action *x* with respect to *O* is also to say that *O* had a right that *T* not perform action *x*. So:  $O \leftarrow \text{not } x \leftarrow T$ . Both *T* and *O* can understand the content of *T*'s duty and the content of *O*'s right. The right and duty correlate with each other because they refer to the same three terms—person *T*, person *O*, and action *x*—and speak the same judgment upon action *x*—that it was not to be done by *T*. Nor is perception of the jural relation limited to *T* and *O*. A third person, Judge *J* or Citizen Juror *CJ*, can understand: that *T* owed a duty to *O*, the nature of that duty, and that *T* violated the duty, thus infringing *O*'s right and in this way wronging *O*.

Not all such wrongs are identical. Rights and their correlative duties vary in content, and the content varies in its engagement with intention. Some duties are duties not to cause particular harms, such as waste.<sup>215</sup> Others are duties not to cause harm unreasonably, such as nuisance.<sup>216</sup> Still others are duties not to perform certain actions on purpose, such as conversion and theft.<sup>217</sup> Now, complications emerge. The richer and more subjective is the mens rea aspect of a duty, the more content dependent it is and the more the jural correlative will seem different to different audiences—*T*, *O*, *CJ*, and *J*. A duty and its correlative right that are intention dependent will seem more transparent from the internal perspective of the actor whose intention is relevant than from the external perspective of a person observing the actor. And it will require specification with respect to all of the factors that render the relevant intention consistent with or opposed to the relevant standard of reasonableness.

The picture is further complicated by the fact that *O*'s rights in a patent or other property are not merely the right to exclude but also liberties of use

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215. *Kane v. Vandenburg*, 1 Johns. Ch. 11 (N.Y. Ch. 1814).

216. See generally MACLEOD, *supra* note 10, at 173–96.

217. See generally MACLEOD, *supra* note 10, at 91–121.

and powers of disposition. Whether or not one accepts the *American Bell Telephone* account of patent's origins, one can *at least* perceive liberties and powers as derived from patent's exclusive grant. In the patent context, these include the rights expressly declared in the Patent Act—liberties<sup>218</sup> to make and use, powers<sup>219</sup> to offer to sell and sell.

The same action or omission can implicate more than one jural relation between *T* and *O*. The same harmful action might comprise multiple wrongs, involving *T* in infringing *O*'s right to exclude *T* and *O*'s right to make use of her own property without *T*'s unreasonable interference. Cases involving vibrations and particle emissions, which sit at the boundary between contemporary trespass and nuisance, illustrate this complexity.<sup>220</sup> In patent infringement cases, one can think of the infringer who steals customers from the patentee by selling an infringing product that competes with both the patentee's patented invention and her unpatented products.<sup>221</sup> The infringer has wronged the patentee by infringing the right to exclude, the powers to offer and sell, and the liberty to use.

Things get more complicated when *T* and *O* go to court. Even a simple trespass case implicates not just one jural relation but rather at least two. For that *T* violated a duty toward *O* does not by itself determine what, if any, relief *O* is entitled to obtain against *T*. The failure to disaggregate the substantive jural relations from the remedial relations is another failing of the conventional account.<sup>222</sup>

218. A liberty in Hohfeldian analysis is the absence of a duty. It correlates with a no-right. *O* is at liberty to make the patented invention because she has no duty not to make the invention and because *T* (and all other relevant persons) has no right to prevent her from doing so. For an explanation for the use of the term "liberty" here in place of Hohfeld's term "privilege," see ADAM J. MACLEOD & ROBERT L. MCFARLAND, *FOUNDATIONS OF LAW* 628–29 (2017).

219. A power is a right to change the legal status of a person or persons. A sale or other disposition of title alters the legal status of the grantee, who now steps into the office of owner. And it alters the legal status of all other persons who might be interested in the thing and who now have to deal with the grantee rather than *O* to obtain licenses, tenancies, and other rights and privileges with respect to the thing.

220. See *supra* Part IV.B.3; see also *infra* Part V.C.

221. See *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538 (Fed. Cir. 1995).

222. For example, in an article concerning so-called "patent holdups," Chien and Lemley make this claim: "A patent that covers the active ingredient in a drug gives the patentee the right to prevent the sale of that drug—that isn't holdup but the patentee's normal right to exclude infringing products." Chien & Lemley, *supra* note 119, at 25. The first use of "right" in this sentence refers to a power to impose a legal disability upon an infringer to continue the infringement. The second use of "right" refers to several rights that work together to secure the patent owner's dominion: a liberty from unauthorized practice of the patent, a power to determine who will be allowed inside the domain of ownership and in what estates (e.g., license, term of years, mortgage) and on what terms, a multital claim right against those who do not have permission, correlating with a duty to self-exclude, and an immunity from liability for exercising those other rights. The authors go on:

By contrast, a patent on a particular circuit layout may constitute only a tiny fraction of the value of a microprocessor that uses the layout, but an exclusion order will exclude the microprocessor as a whole, preventing the defendant from importing both the small infringing element and the much larger noninfringing elements. The social harm in this latter case is disproportionate to the social

In jurisprudential terms, it is coherent to say that *O* has a legal claim right that *T* not perform action *x* though *O* does not *also* have a power to obtain a remedy against *T* for infringing the claim right. *O*'s claim right has persistent practical meaning as a reason for *T*'s present and future action even if no sanction attaches to its deprivation. For example, *T* might have trespassed against *O*, but *O* is barred from recovery by a statute of limitations.<sup>223</sup> Nevertheless, *T* has a continuing duty not to trespass.

But what if *T* is willing to continue trespassing after becoming aware of *B*'s rights? If *T* is trespassing knowingly or intentionally, then he is deliberately failing to take *O*'s rights and his correlative duties as conclusive reasons for his own actions. This willful failure to act lawfully renders rights and duties meaningless in the practical deliberations in which they matter—*T*'s practical deliberations. Law and equity step in to empower *O* to obtain redress, lest rights and duties lose their practical meaning.

Because the remedial issue bears the practical payout of the liability issue, the jural relations within a trespass case affect each other. For most practical purposes, *O*'s claim right is tied to a power to impose some legal disability upon *T* in the form of a duty to pay damages or an injunction depriving *T* of his power to perform action *x* (and *T*'s duty must be enforced with such a disability).<sup>224</sup> And the type of claim right will generally influence or even determine the type of power. One insight underlying the familiar distinction between property rules and liability rules<sup>225</sup> is that the remedy given to correct a wrong partly determines the right in the deprivation of which the wrong consists, and vice versa,

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benefit, as many productive, noninfringing components will be shut down to give the patentee control over only a single, small component.

*Id.* In the first sentence, all talk of rights has dropped out and we are left only with use values. But the use value is secured by and justifies the very same complex of rights that the authors discerned in the drug patent. The second sentence refers only to "control," which in context seems to be the power to impose a liability on the infringer. What became of the rest of the rights? Did they disappear because the authors do not perceive their "social benefit"?

223. See *Munger v. Seehafer*, 890 N.W.2d 22, 28, 32–39 (Wis. 2016).

224. This is how the correlation between jural relations has conventionally been thought of since the Legal Realist revolution, for it is assumed that the disability must be imposed upon *T* by some judicial official after adjudication. A different way to view the correspondence between the relations which is more consistent with a traditional, common-law approach, is to say that *T*'s disability is entailed in his violation of *O*'s claim right because that violation is a wrong by which he has forfeited some of his own rights, and a court that enters judgment in *O*'s favor with a fully specified remedy is merely enforcing and giving full determination to the pre-existing disability. I am grateful to Eric Claeys for prompting this clarification.

225. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); see also Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997).

especially when those rights are powers and liberties of disposition.<sup>226</sup> Thus, injunctions are appropriate to vindicate property rights, and damages are appropriate to vindicate nonproperty rights.

It follows that “the right to exclude conferred by an IP right triggers as a strong presumptive consequence . . . that an IP holder get an injunction.”<sup>227</sup> The reason is not just that damages are inadequate to remedy the injury from a trespass but also that the right to exclude can be viewed as a liberty to refuse to transact with another together with an immunity for refusing. (Of course, it entails other rights as well.) The absence of injunctive relief confers upon the trespasser a power to force a transaction upon the owner without her consent and is thus radically incompatible with the owner’s liberties and powers of disposition and her immunities for their exercise. So, Eric Claeys argues, “Remedy determinations provide the first and simplest forum in doctrine where courts can work out the scope and limits of proprietary rights of disposition.”<sup>228</sup>

Noneconomic reasons also support the general presumption in favor of punitive and equitable remedies in cases of intentional and willful trespass. Indeed, the property-rule/liability-rule framework without more can obscure what is most important about the law’s coercive deployment in remedies from the perspective of owners and would-be trespassers, right holders, and duty bearers.<sup>229</sup> For at stake is whether the owner is to be used instrumentally, as a mere means to *T*’s ends.<sup>230</sup> *O* and *T* are both moral agents; *both* hold rights and *both* bear duties, which are conclusive reasons for them to act and refrain from acting. Grounding a remedy in something wholly foreign to their reasons for action raises the concern that law fails to respect their agency. Whether the moral value underlying this concern is expressed as personal autonomy, practical reasonableness, Kantian equal respect, or the general prohibition against intentionally harming another human being in any basic aspect of their flourishing,<sup>231</sup> the remedy must respond to the nature of the wrong. So it must deflect any further acts by *T* which instrumentalize *O*, else law and equity fail to respect both *T* and *O* as moral agents.

The legal principle which protects that value is given (incomplete) specification in the *sic utere maxim*.<sup>232</sup> A wrong inflicts coercion upon the

226. Compare Lemley & Weiser, *supra* note 98, at 783, with Eric R. Claeys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON L. REV. 825 (2015) [hereinafter *Infringement Remedies*], and Claeys, *supra* note 119, at 1038–40, 1058–63.

227. *Infringement Remedies*, *supra* note 226, at 825.

228. *Id.* at 827.

229. Cf. PENNER, *supra* note 10, at 66–67; *Infringement Remedies*, *supra* note 226, at 838–39.

230. See FINNIS, *supra* note 3, at 456 & n.30.

231. *Id.* at 456.

232. So use your property as not to injure the property of another.

right bearer, depriving her of independence, one of the important preconditions of her autonomy and practical reasonableness.<sup>233</sup> And the harm resulting from intentional wrongs is harm not only to the right holder but also to the duty bearer. For performing a wrong *intentionally* makes one a wrongdoer, a different person than one was before one became willing to do the wrong, a person who is now willing to make another's loss one's own gain and to use that person "as a resource for a good that no longer includes their own."<sup>234</sup>

This aspect of commutative justice is not fully comprehended within economic considerations of distribution and efficiency alone.<sup>235</sup> Intention matters in the specification of rights and duties because human agents are not mere utility maximizers; we are also moral agents with choice and free will who constitute ourselves in the order of the will by those actions that we undertake for reasons and other chosen motivations: intentionally.<sup>236</sup> Our choices endure in us, as John Finnis explains.

To intend something is to choose it, either for its own sake or as a means; and to choose is to adopt a proposal (a proposal generated by and in one's own deliberation). Once adopted, the proposal, together with the reasoning which in one's deliberation made that proposal intelligently attractive, *remains*, persists, in one's will, one's disposition to act. The proposal is, so to speak, synthesized into one's will, one's practical orientation and stance in the world.<sup>237</sup>

This makes intended means and ends different from the unintended consequences of one's choices and actions, even when those side effects are or could have been foreseen.<sup>238</sup> In an act of intentional wrongdoing, unlike in an act of harm that is not intended, the wrongdoer violates the norm against treating others as mere means and sets his willing and choosing against the equal status of all persons as bearers of basic rights.<sup>239</sup>

To allocate remedies and distribute rights and duties for the purpose of reducing waste and achieving other future economic ends without regard to the intentional wrong that has been committed is to fail to redress the wrong. This is not to deny that efficiencies, especially information-cost efficiencies, are sufficient reasons for some rules and relevant

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233. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 179–82 (1993); MACLEOD, *supra* note 10, at 106; RAZ, *supra* note 14, at 377–78.

234. 4 JOHN FINNIS, *COLLECTED ESSAYS* 347–48 (2011).

235. *Id.* at 337–52.

236. FINNIS, *supra* note 53, at 37–38; 1 JOHN FINNIS, *COLLECTED ESSAYS* 237–43 (2011).

237. FINNIS, *supra* note 234, at 347.

238. *Id.* at 347. But foreseen effects are not irrelevant. *Id.* at 351–52.

239. *Id.* at 349–50.

considerations in the specification rights. (I return to this below.) It is to deny that the specification of a right works backward from future consequences to choice of damages or injunction to selection of a rule allocating property or nonproperty.

Rights and duties have existence independent from the legal consequences attached to their violation because consequences are not the only reasons we have to act with respect to other persons. Each aspect of the trespass case thus comprises a distinct jural relation, though those jural relations are interdependent. And because different people have different motivations for examining a trespass case, they might perceive different aspects of the case as more or less important. For this reason, the jural relations within a trespass action might *present* differently from the perspective of the right holder than they do from the perspective of the duty bearer, and might *seem* different from the perspective of a third-party outsider than they do from the perspectives of those who have a stake in the dispute. A wrongdoer—O.W. Holmes Jr.'s famous “bad man”<sup>240</sup>—who cares only about the consequences he will suffer for his actions and omissions sees law differently than the man who finds his reasons for action in the “sanctions of conscience.”<sup>241</sup> The bad man is interested only in the remedy and sanction. The conscientious man wants to know what his duties are. And a social scientist, who is interested in knowledge *about* jural relations, will often perceive the dispute between A and B differently than both A and B perceive it. From her perspective the relations comprising the dispute are matters of descriptive, not practical inquiry. She is not interested because she wants to know what to do but because she wants to know what is the case.

In this light one can perceive both the immediate information–cost benefits of simple property rules—stay out—and the enduring importance of deflecting willful wrongs. All of the above-mentioned complexities must be multiplied by the total number of people who are interested in practicing the patent. The law of infringement is concerned not only with the actual dispute between *T* and *O* but also with potential disputes that might implicate *C, D, E . . .* Property consists of multital rights, meaning that its rights are good as against any number of people at once. *O* has a right to exclude *T*, and the same right to exclude *C, D*, and all other nonowners who do not hold a right or privilege to enter. And *O* has other rights that are good as against nonowners. Because *O* has a liberty to make reasonable uses, *O* is immune from liability as long as his uses are reasonable and that

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240. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897).

241. *Id.* at 459. Holmes used this latter phrase derisively. Legal philosophers since Holmes have noticed that the man who obeys law as a sanction of conscience, out of moral obligation, is actually doing something good. *See, e.g.,* FINNIS, *supra* note 3, at 134–60, 231–96.



immunity is good against everyone. At the same time, law and equity are interested in the long-term dispositions of *T*, *C*, *D*, and the rest to honor *O*'s rights, if for no other reason than the inefficiency of remedying wrongs.

These distinctions elucidate the question that the Court confronted in *Continental Paper Bag* and left ambiguously resolved in *eBay*. Nonuse of a patent does not defeat a petition or motion for equitable relief because the patent owner has no affirmative duty to practice the invention, meaning that he is at liberty to practice the invention or not, meaning that infringers have no power to deprive the patentee of equitable relief for nonuse (those ways of expressing the matter all boil down to the same thing). (Slippage between different types of rights—especially between a liberty, a claim-right, and a power—is also a common failing of the conventional account.)<sup>242</sup> As the Court put it in a famous passage in *American Bell Telephone*, “The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention.”<sup>243</sup>

At the same time, potential infringers have a duty to exclude themselves from the patent (and infringers have a duty to exclude themselves in the future once placed on notice of the infringement), which means at the very least that the owner has a claim right against infringers and potential infringers that they not practice the invention. An act of infringement infringes that right and breaches that correlative duty. Once the infringer has breached his duty of self-exclusion, the patent owner is presumed to have, in addition to a right to legal damages, a right to injunctive relief, meaning a power to impose upon the infringer a disability to continue the infringement. The infringer's breach of his duty of self-exclusion by itself gives rise to that power. The *Continental Paper Bag* Court expressed the same idea from the other end of the jural relation, saying, “the right can only retain its attribute of exclusiveness by a prevention of its violation.”<sup>244</sup>

## 2. *Different Jural Relations Appear From Different Perspectives*

Different rights in *O*'s ownership will interest different people because different people have different motivations to take an interest in *O*'s property. *T* might hope to enter the res and therefore is most interested in *O*'s right to exclude. *B* might want to obtain an injunction against *O*'s use of the res and therefore is most interested in *O*'s liberty and immunity of

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242. An example of this confusion can be observed in *Bessen & Meurer*, *supra* note 98, at 6.

243. *United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 250 (1897).

244. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 430 (1908).

use. It is no different when we turn to examine legal protections for inventions. The law governing patents will appear to have different essences or central facets, depending on the perspective with which one views it.

One facet is discerned from a perspective that is external to actors within commerce and the patent system, such as the view of a lawmaker or a social scientist. This way of looking at patents addresses itself to an agent who has reason to maintain a position of neutrality. It is descriptive and not evaluative. Its objects of inquiry are sometimes referred to as “objective” considerations, though that is misleading. The actions and consequences it considers are no more or less objective than cultural assumptions, the motivations and preferences of the relevant actors, undetermined actions of the human will, blind chance, and other so-called “subjective” considerations that elude scientific measurement. It is best distinguished instead by its methodological viewpoint. This viewpoint is known by different names in different fields. The legal philosopher H.L.A. Hart called it the “external” point of view.<sup>245</sup> Economist and sociologist Joseph Shumpeter called it “observer’s rationality.”<sup>246</sup> And the theologian and medievalist C.S. Lewis described it as “looking at” a phenomenon.<sup>247</sup> Each of these expressions is a way of identifying the observational perspective of the person who studies human actions and practices and their measurable consequences from outside those actions and practices.

From the external, observational perspective, the essence of a patent might appear to be the exclusion right. This perspective yields the now well-known insight that simpler rules are more information–cost efficient than complex rules.<sup>248</sup> The right to exclude, specified fully with respect to the thing, is most efficient.<sup>249</sup> From the view of someone concerned with avoiding or resolving conflict simply and with minimal information cost,<sup>250</sup> the most important or meaningful thing to know about patent ownership is the patent owner’s right to prevent others from exercising the patent,<sup>251</sup> and the most important thing to know about the patent is the boundaries of the

245. HART, *supra* note 9, at 89–91.

246. JOSEPH A. SCHUMPETER, *THE ECONOMICS AND SOCIOLOGY OF CAPITALISM* 319 (Richard Swedberg ed., 1991).

247. C.S. LEWIS, *Meditation in a Toolshed*, in *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 212, 212 (Walter Hooper ed., 1970).

248. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000); see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 *WM. & MARY L. REV.* 1849, 1850–52, 1856–57, 1890–91 (2007) [hereinafter *Morality of Property*].

249. Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 *YALE L.J.* 1742, 1746–49, 1782–98 (2007) [hereinafter *IP as P*]; Henry E. Smith, *Property and Property Rules*, 79 *N.Y.U. L. REV.* 1719, 1753–74 (2004) [hereinafter *Property Rules*].

250. See *Morality of Property*, *supra* note 248; see also *IP as P*, *supra* note 249.

251. *IP as P*, *supra* note 249, at 1746–49, 1782–98.

claim.<sup>252</sup> Insofar as the exclusion right is determined according to actions, those things to know are the same thing to know. The patent claim itself specifies the boundary between liberty and liability. From this perspective, it makes sense to say that one who trespasses on the claim or its substantial equivalent, who breaks the close of the patent claim with or without an intention to do so, is liable for infringement.

Another perspective is internal to the actors within commerce and the patent system. Those people will view different facets of the patent as most essential, either the right to exclude, or the liberty to use the knowledge claimed in the patent, or the power to offer and sell. Those facets address themselves to the practical viewpoint of the person who acts or omits to act for reasons. This is what Hart called the “internal” point of view,<sup>253</sup> Shumpeter called “[r]ationality in the [o]bserved,”<sup>254</sup> and Lewis referred to as “looking along” a way of understanding.<sup>255</sup> This is the perspective of those for whom the rights and duties are matters of practical significance. They want to know what should and should not be done, or what might happen to them if they do or do not.

This perspective and its objects—both means and ends—can also be described, and a study that takes them into consideration does not by virtue of accounting for them become any less descriptive or any more normative than a study that confines itself to the external perspective. Indeed, a study that takes account of both external and internal considerations is more comprehensively descriptive than one that omits internal considerations. For it is a fact that people choose and act because of various reasons and other motivations that are not reducible to efficiency and are not always revealed in their actions. So we can build a descriptive account of the practical perspective of those actors within the systems and institutions of innovation and commerce.

From this perspective, the essence of patent seems to be the rights and duties that govern making, using, selling, and offering to sell a patented invention. Those rights and duties can be arranged in any number of ways. Therefore, from the internal point of view of those within the patent system, the most important or meaningful thing to know about a patent varies from case to case. The essence of a patent depends upon how the patent affects relations between persons and particularly how it affects their choices and actions concerning each other. The boundary between liberty and duty is not always fully specified in rem—with respect to the thing itself—but can vary according to the intentions of one person toward

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252. *Id.* at 1783–87.

253. HART, *supra* note 9, at 89–90.

254. SHUMPETER, *supra* note 246, at 323 fig. 1.

255. LEWIS, *supra* note 247, at 212.

another person in particular circumstances that implicate an invention or some other productive innovation.

#### *D. Focal Senses of Trespass*

Viewing the jural relations through various internal and external perspectives provides a comprehensive picture. This picture conforms closely to Blackstone's conceptual account of trespass. Three perspectives are enlightening: (1) the perspective of lawmakers and social scientists who are external to the jural relation between *T* and *O*; (2) that of trespassers and potential trespassers who encounter property that does not belong to them; and (3) the internal perspective of owners and their lawful collaborators, such as mortgagees and licensees. Each of these perspectives on infringement opens to view a different facet of trespass, all of which together form the pattern of infringement doctrine. On each of these facets appears a form of trespass that, viewed from a particular perspective, seems to be the most essential or important kind of trespass. I call these (1) *in rem* trespass, (2) intentional trespass, and (3) culpable trespass. Each of these aspects of trespass explains different reasons animating patent infringement in ways that help us make sense of the doctrine and the particular rules that are derived from it.

##### *1. In Rem Trespass*

*In rem* trespass is any action that breaks the close of another's property without consent. It corresponds to Blackstone's definition of trespass *ab initio*.<sup>256</sup> In the patent context, *in rem* infringement is any action that constitutes practicing the patent claim, defined as its four corners plus its substantial equivalents. *In rem* infringement is intelligible as an action that infringes the right to exclude, without more. Thus, an innocent entrance within the close of the patent is nevertheless an infringement, while a culpable action that does not constitute practicing the invention—for example, thwarting a potential deal between a patentee and a licensee out of spite—is not an infringement. Everything turns on whether the alleged infringer is standing within the close of a valid patent claim or not.

*In rem* trespass refers to actions, causes, and consequences. It addresses itself primarily to an observational viewpoint, Hart's "external" point of view. Anyone observing the act of trespass who can identify the boundaries of the *res* can say whether an *in rem* trespass has occurred. This is because the trespass is defined, specified, and proscribed *in rem*—with respect to the thing itself. The duty of which *in rem* trespass is the violation correlates

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256. See, e.g., 3 BLACKSTONE, *supra* note 88, at \*213–14.

with the owner's right to exclude others from the thing, without more, settled and specified once and for all against the rest of the world as a two-term relation between the owner and the thing owned.

However, intention is not inherently irrelevant to in rem trespass. An in rem trespass involves intentional action, though it does not necessarily involve intentional trespass. The relevant intention is neither a purpose to commit a wrong, nor a purpose to cause some resulting harm, nor an intention to enter the close of another's patent claim, but rather simply an intention to perform the act.<sup>257</sup> This is a possible sense of the first Restatement's insistence that nonvolitional conduct is not actionable.<sup>258</sup> Ignorance of others' rights is no excuse. Any intentional act will do. The intention need not refer to the thing or the thing's owner. But a complete lack of volition would make hash of the idea of trespass as a wrong.

Direct patent infringement is a central case of in rem trespass.<sup>259</sup> Another is intangible invasion of real property. An instructive case is *Johnson v. Paynesville Farmers Union Cooperative Oil Co.*<sup>260</sup> The complaint alleged trespass and nuisance caused by drifting pesticides used on neighboring farm fields.<sup>261</sup> The court ruled that trespass liability would not lie absent a physical invasion of the right of exclusive possession,<sup>262</sup> while obversely, "entry upon the land that interferes with the landowner's right to exclusive possession results in trespass whether that interference was reasonably foreseeable or whether it caused damages."<sup>263</sup>

The essence of the trespassory invasion is the action, rather than any culpable intention. What must be intended is the action that is trespassory, not the trespass itself.<sup>264</sup> The components of this state of mind are an intention to perform the act, a less purposeful state of mind (recklessness or reasonable foreseeability) with respect to the boundaries of the close, and no necessary intention to cause harm. Alternatively, one might say that the harm consists of the infringement of the exclusion right itself, in which case it is more precise to say that no intention to cause harm is required other than the reckless or negligent state of mind with respect to the boundaries of the res.

In rem trespass also addresses itself to the internal perspective of the owner. And from that perspective the moral value of the rule emerges. A

257. See *Hogg v. Emerson*, 52 U.S. (11 How.) 587, 607-08 (1850); see also Vishnubhakat, *supra* note 30, at 609.

258. RESTATEMENT (FIRST) OF TORTS § 2 cmt. a (AM. LAW INST. 1934).

259. See *Hogg*, 52 U.S. at 607-08.

260. 817 N.W.2d 693 (Minn. 2012).

261. *Id.* at 696.

262. *Id.* at 702-03.

263. *Id.* at 703.

264. *Id.* at 704; cf. *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979).

simple exclusion rule, applicable to all but the owner and those who are within the domain of ownership with the owner by the owner's consent, secures to the owner and her collaborators a zone of independence and liberty. Those within the domain exercise practical reason free of coercion and interference by others. Their autonomy and independence result in part from an *in rem* trespass rule, which gives them a categorical right to exclude and a remedy for violation of the right.<sup>265</sup>

To fail to respect another's right to exclude is to fail to respect that person as a right bearer. And for courts to fail to remedy violations of the right to exclude is to fail to treat right infringement as a wrong. Yet because the claim right to exclude is overinclusive of the uses and values that ownership serves—because not all trespasses cause harm—in *rem* trespass does not by itself dictate *which* remedy is appropriate. This explains why the first stage of specification of trespass is complete once a breaking of the close is shown and why equitable relief is presumptively required, and it leaves open the possibility that equitable relief might not be appropriate if the trespassory invasion is neither culpable nor harmful.<sup>266</sup>

## 2. *Intentional Trespass*

Intentional trespass is more precise. It is a legal wrong committed against an owner *qua* owner. It encompasses Blackstone's "willful" trespass, which is performed with notice of the owner's rights.<sup>267</sup> While in *rem* trespass turns on actions with respect to things, intentional trespass turns on the purposes and motivations with which actions are performed. It refers not just to the external, material world of actions and consequences but also to the internal, practical deliberations of moral agents who choose and act for reasons. One commits an intentional trespass when one encounters something one does not own and which one knows one has no authority to enter or possess and one nevertheless enters or possesses with an intention to do so, for the *reason* of doing so.

Famously in real property law, intentional trespass justifies enhanced damages and equitable relief. The corollary is that unintentional trespass, while actionable as *in rem* trespass, will not support enhanced damages or permanent injunctive relief.<sup>268</sup> The central case is *Jacque v. Steenberg Homes*.<sup>269</sup> After asking and being denied permission to drag a mobile home across the Jacques' frozen farm fields, Steenberg Homes' agent dragged the

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265. Compare ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016), with *Infringement Remedies*, *supra* note 226, at 840–49.

266. See generally *Infringement Remedies*, *supra* note 226.

267. See, e.g., 3 BLACKSTONE, *supra* note 88, at \*213–15, 401.

268. *Malchow v. Tiarks*, 258 N.E.2d 811, 814–15 (Ill. App. Ct. 1970).

269. 563 N.W.2d 154 (Wis. 1997).

home across the field anyway en route to delivery of the home on a nearby lot.<sup>270</sup> The assistant manager in charge of the operation reportedly told his employees, "I don't give a——what [Mr. Jacque] said, just get the home in there any way you can," and instructed them to conceal their activities from Mr. Jacques's view.<sup>271</sup> The employees then cut a road through the snow across Mr. Jacques's frozen field.<sup>272</sup>

The Jacques suffered no actual, compensable damages and were entitled to nominal damages of \$1.<sup>273</sup> Nevertheless, a jury assessed punitive damages of \$100,000.<sup>274</sup> The Supreme Court of Wisconsin upheld the award, ruling that the requirement of compensable damages to support a punitive damages award is "inapposite when the wrongful act is an intentional trespass to land."<sup>275</sup> The court reasoned that in cases of intentional trespass, "the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual's right to exclude others from his or her property."<sup>276</sup> The "individual interests invaded by an intentional trespass to land" consist first of all in the right to consent to or refuse entry to any person,<sup>277</sup> and second in the harm that one causes to another's property rights any time one intentionally trespasses.<sup>278</sup> Also, people rightly "expect wrongdoers to be appropriately punished."<sup>279</sup> What performs the normative work in such cases is not an assessment of consequential damages as between the parties or utility for society at large but rather that one person acted wrongfully by depriving the other of his right.

### 3. *Culpable Trespass*

Once one enters into the internal point of view of the actors (discerning reasons and other motivations for actions) for descriptive purposes (to observe and evaluate rather than to choose and act, as the agent herself does) one can recognize that the duty of self-exclusion is not the only duty that moral agents owe to (other) owners. From his own perspective, any moral agent under consideration is continually confronted with practical problems that require choice and action with respect to things that are

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270. *Id.* at 156–58.

271. *Id.* at 157 (alteration in original).

272. *Id.*

273. *Id.* at 158.

274. *Id.*

275. *Id.* at 158.

276. *Id.* at 159.

277. *Id.* at 159–60.

278. *Id.* at 160.

279. *Id.* at 161.

owned. And any number of partly settled obligations or fully determined duties might bear upon any one or more of those problems. Just as it would be morally arbitrary for the agent who bears them to leave any of them out of consideration, the scholar or jurist who aims faithfully to describe the practical deliberations of that agent would not be offering a comprehensive account by leaving any of them out. Therefore, a complete and accurate account of the norms of trespass must take into consideration all of the obligations and duties owed to owners and their collaborators.

Each of us bears several duties with respect to a person who occupies the office of owner, not to mention the duties owed to those whose authority is derived or carved out of the owner's office, such as mortgagees, tenants, and licensees. The rights that correlate with those duties severally comprise the aspects of ownership from the various perspectives of those who interact with owners and their things. The breaches of those duties are known in the common law tradition as wrongs. Taken together as a class of legal norms, those breaches can be called culpable trespass.

Culpable trespass is an action undertaken to interfere with the plans of action of an owner or someone who exercises the authority of ownership (e.g. a bailee, licensee, or tenant) which involve the exercise of property rights. It is an act that intentionally burdens claims, liberties, powers, and immunities of ownership. Unlike nuisance it involves a culpable intention toward another person; like nuisance it essentially involves injury to some property right.<sup>280</sup> Whereas in nuisance the actionable conduct is harm deemed unreasonable in light of all the circumstances<sup>281</sup> in culpable trespass, depriving another of the benefits of use and enjoyment is (at least part of) the trespasser's *purpose*.

Blackstone's "malicious" trespass is the focal meaning of culpable trespass.<sup>282</sup> The classic central case is the old English case *Keeble v. Hickeringill*.<sup>283</sup> Keeble invented and constructed on his land a decoy and trap for ducks. Hickeringill "knowing it, and intending to deprive him of the benefit thereof, and to hinder the ducks from coming to the decoy, did, on divers times, shoot off and discharge guns, &c. maliciously,"<sup>284</sup> in other words, not to benefit himself but only to disrupt Keeble's use of his invention. Nothing indicates that Hickeringill physically entered or caused physical intrusion on Keeble's land, came into contact with the duck-trapping contraption, or in any other way infringed Keeble's right to

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280. See Winfield, *supra* note 188, at 201-04.

281. *Id.* at 199.

282. See, e.g., 3 BLACKSTONE, *supra* note 88, at \*213-15.

283. (1707) 88 Eng. Rep. 945.

284. *Id.* at 945.



exclude. Yet a verdict was found for Keeble in trespass on the case.<sup>285</sup> Chief Justice Holt rendered judgment on the verdict for Keeble.<sup>286</sup>

In a fuller report of the case,<sup>287</sup> Holt expressly grounded Keeble's power in his property rights—particularly his liberty to use—and Hickeringill's liability in the culpability of his conduct. Keeble's use of the decoy was lawful, for "[e]very man that hath a property may employ it for his pleasure and profit."<sup>288</sup> Hickeringill disrupted Keeble's profitable employment, which involved "skill and management," and "he that hinders another in his trade or livelihood is liable to an action for so hindering him."<sup>289</sup> Whether or not disruptions or disparagements of another's productive use of his property cause any damage is irrelevant, for such actions are "mischievous in themselves; and therefore in their own nature productive of damage."<sup>290</sup>

Holt identified two independent aspects of this mischief, either of which would sustain an action on the case. The first is the wrong against Keeble's property right, which Holt distinguished from a "franchise or privilege," a "liberty in which the public hath a benefit."<sup>291</sup> Keeble was using his own property, and it was no one else's concern, least of all Hickeringill's, how he used it as long as his use was not unlawful. The second aspect is Hickeringill's malice, which distinguished his action from effective competition, as where a schoolmaster establishes a new school and steals away another's pupils.<sup>292</sup> If Hickeringill had set up his own competing duck decoy, "no action would lie, because he had as much liberty to make and use a decoy as the plaintiff."<sup>293</sup> But in the case, Hickeringill's conduct was inherently culpable. That Keeble did not identify the number of ducks that Hickeringill successfully scared away is therefore irrelevant.<sup>294</sup> Keeble made and executed a successful plan for the productive use of his property and Hickeringill acted with a purpose to disrupt that plan, to the benefit of no one.<sup>295</sup>

In patent infringement, a central case is *Emack v. Kane*.<sup>296</sup> Emack and Kane were competitors. Both manufactured writing slates that were

285. *Id.*

286. *Id.*

287. (1707) 11 East 574.

288. *Id.* at 575.

289. *Id.*

290. *Id.*

291. *Id.* at 575–76.

292. *Id.* at 576.

293. *Id.* at 576.

294. *Id.* at 576–77.

295. For a fuller explanation why such spiteful acts are actionable, see MACLEOD, *supra* note 10, at 146–96.

296. 34 F. 46 (C.C.N.D. Ill. 1888).

muffled to reduce noise when the slates came into contact with other hard objects.<sup>297</sup> Both claimed valid patents for the inventions they were manufacturing.<sup>298</sup> Emack claimed under patents issued to Butler and Mallet, while Kane claimed under a patent issued to Goodrich.<sup>299</sup>

In 1882 or 1883, Kane began distributing circulars that accused Emack of infringing the Goodrich patent and threatened to file suit against anyone who purchased from Emack.<sup>300</sup> Kane and his business partners succeeded in harming Goodrich's business, but were not earnest in pursuing an infringement action. They initiated three lawsuits against Emack's customers, but each time Emack assumed defense and each time Kane voluntarily dismissed "under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits."<sup>301</sup> This showing warranted a finding that Kane's threats to Emack's customers "were not made in good faith" and "that said suits were brought in a mere spirit of bravado or intimidation, and not with a *bona fide* intent to submit the question of infringement to a judicial decision."<sup>302</sup>

On the basis of this finding, a judge enjoined the publication and distribution of the circulars.<sup>303</sup> "It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights."<sup>304</sup> The judge explained,

While it may be that the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade, or otherwise, yet, if the owner of a patent, instead of resorting to the courts to obtain redress for alleged infringements of his patent, threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor, and destroying his competitor's business, it would seem . . . that such acts of intimidation should fall within the preventive reach of a court of equity. It may not be libelous for the owner of a patent to charge that an article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the *gravamen* of this

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297. *Id.* at 47.

298. *Id.*

299. *Id.*

300. *Id.* at 47-48.

301. *Id.* at 49.

302. *Id.*

303. *Id.* at 51.

304. *Id.* at 50.

case is the attempted intimidation by defendants of complainant's customers by threatening them with suits which defendants did not intend to prosecute . . . .<sup>305</sup>

The right infringed was not the right to exclude. Kane was not shown to have practiced the invention covered by Emack's patents, but to have interfered in Emack's *use* of his patents. Further, the infringement of the right turns on the internal motivation of the infringer. Kane was enjoined not because he advised Emack's customers of his belief in his superior patent rights but because he did so in bad faith, not with an intention to enforce his own rights but only to destroy Emack's business.<sup>306</sup> This distinction is crucial in cases enjoining disparagement of another's patent.<sup>307</sup>

The right at issue might be characterized as simply the goodwill property of Emack's business.<sup>308</sup> But that is not how the parties themselves characterized the rights at issue in the case. Both Emack and Kane relied in their business dealings on the specifications in their patents.<sup>309</sup> The *reason* why both competitors acquired patents was to secure use of the inventions specified in those patents. The Patent Act does not dictate their use—which is to say they are at liberty to use as they wish (or not)—and if their patents were anticipated then the Act might not ultimately provide the security they hoped for. Yet in *Emack v. Kane* and similar cases, the parties understood themselves to be exercising patent rights and to be secure in their business practices because of those rights.<sup>310</sup> The value of the patent is not for offensive purposes, pursuing infringement actions against other users, but rather defensively to prevent being sued as one carries on one's business.<sup>311</sup> Put differently, the patents are valuable to these owners because of their

305. *Id.*

306. *Id.*

307. *Adriance, Platt & Co. v. Nat'l Harrow Co.*, 121 F. 827, 829–30 (2d Cir. 1903); *A.B. Farquhar Co. v. Nat'l Harrow Co.*, 102 F. 714, 715 (3d Cir. 1900).

308. Judge Blodgett characterized the rights infringed by the malicious libels as both business goodwill and patent rights. *Emack v. Kane*, 34 F. 46, 50 (C.C.N.D. Ill. 1888). In dicta the judge went on to opine, "I do not think the fact that complainant was the owner of these patents or operating under them, material to the questions in this case." *Id.* at 51. Authorities are split on the question whether injurious libel of a business operating without a patent, which is accused of infringing the libeler's patent, is actionable as unfair competition. See generally Annotation, *Right to Enjoin Threats of Suits for Alleged Infringement of Patent*, 98 A.L.R. 671 (1935).

309. Those were narrowly construed because of "a still older patent, granted to one Munger, in 1860, for a muffled or noiseless slate, which most clearly so far anticipates the patents of both complainant and defendants, as to limit them, respectively, to their specific devices." *Emack*, 34 F. at 51.

310. See *Kidd v. Horry*, 28 F. 773, 774 (C.C.E.D. Pa. 1886) (allegation that the malicious libel injured both patent rights and business goodwill); *Adriance, Platt & Co.*, 121 F. at 828–29 (the parties disputed the validity of their competing patent claims).

311. See *Burk & Lemley*, *supra* note 96, at 1628–29.

liberties of use and immunities for using, rather than for any claim right to exclude or power to impose a legal disability upon an infringer. From the perspective of these owners, the patent rights connected with use are more important—more central or essential—than those connected with exclusion and with remedies.

#### 4. *Rights and Infringements*

The unitary conception of patent infringement as a strict liability trespass does not account for the variety of infringement doctrines both because the unitary conception of patents as essentially the right to exclude does not account for the plurality of patent rights and because different deprivations of those rights constitute different wrongs. This is even clearer in patent law than it is in the law of real and personal property, for the complex architecture of patent rights and duties is made explicit in the Patent Act. The Act secures the owner's "right to exclude others from making, using, offering for sale, or selling the invention."<sup>312</sup> The express qualification of the right to exclude points toward the end of patent protection, namely freedom to make certain uses of the patent. Exclusion stands as a multital claim right against would-be users, guarding the perimeter around a sphere of enumerated actions that nonowners are forbidden to undertake. Thus the core patent *liberties* and *immunities* are usufructs—rights to make, use, offer to sell, and sell—that are infringed when exercised by someone other than the patent owner. Lest there be any doubt that the Act is concerned to secure usufructuary rights, § 271—the provision governing infringement—does not merely prohibit violation of a right to exclude. Instead, it forbids nonowners who lack authority to make, use, offer to sell, or sell.<sup>313</sup> When those actions are undertaken by the owner or someone who exercises the owner's authority, the rights to perform those actions are use rights.

The patent owner's freedom to exercise the patent rights produces another layer of complexity. For different patents serve different interests and goods, and patent rights secure those interests and goods against interference by those who are not the owner and are not in lawful collaboration with the owner (such as licensees and contractors). This is why utilitarian justifications for patent protection are plausible. The goods that patent rights secure are justificatorily prior to the rights themselves. But insofar as those goods are incommensurable, utilitarian justifications fail to account for the plurality of rights and wrongs which secure those goods. The empirical case for patent protection has not failed for lack of

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312. 35 U.S.C. § 154(a)(1) (2012).

313. 35 U.S.C. § 271(a) (2012).

effort by utilitarians and economic scholars. It fails because there exists no single, unitary measure for all the goods and interests that patent law protects. For there exists no summum bonum that contains all of the value of all the other goods, plus something more.<sup>314</sup>

Insofar as different patent rights secure different goods and interests, infringements of different patent rights cause different harms and constitute different wrongs. Trespass against the patent is therefore not a single act but several different acts, each consisting of a unique wrong insofar as each consists of the deprivation of a unique right. This pluralism is not infinite. Many rights, especially the right to exclude, are settled and specified without regard to how they are exercised, the goods that they secure, and the harms that they prevent. Many robust rights, especially multital liberties and immunities, present the same facet to all audiences and impose the same duties of abstention<sup>315</sup> on everyone. But many rights are more particular, especially duties that correlate with duties of action, which must be settled and specified with respect to particular reasons for action (intentions, purposes, etc.) and are therefore transparent for the goods and interests that they serve.<sup>316</sup> Any account of trespass generally, and infringement in particular, that does not encompass this plurality of rights and duties in patent law will fail to render patent law coherent.

## V. SOME IMPLICATIONS

### A. *Direct Infringement*

The conventional account is most plausible as a partial definition of direct infringement as trespass in rem. It captures Blackstone's description of the first stage of the trespass inquiry, which involves only whether the actor has broken the close without consent. In Blackstone's account, followed more closely by the Second Restatement than the First, the actor's intention is not relevant at this first stage of determination. In this sense (and only this sense), trespass and patent infringement can be said to be strict liability offenses. But of course the liability inquiry does not end at the first stage. Rather, it next turns to inquire into the alleged trespasser's motivations for purpose of determining justification for entry. If he broke

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314. This problem is known in legal and moral philosophy as incommensurability. See RAZ, *supra* note 14, at 321–66; PHILIPPA FOOT, MORAL DILEMMAS AND OTHER TOPICS IN MORAL PHILOSOPHY 76–77 (2002); FINNIS, *supra* note 3, at 111–18. One classic statement of incommensurability colorfully explains that the “injunction to maximize good is . . . senseless in the way that it is senseless to try to sum together the size of this page, the number six, and the mass of this book.” FINNIS, *supra* note 3, at 113.

315. Such rights inherently correlate with duties of abstention, as I explain in MACLEOD, *supra* note 10, at 197–205; see also Finnis, *supra* note 203, at 53–54.

316. MACLEOD, *supra* note 10, at 197–205; Finnis, *supra* note 203, at 53–54.

the close for one of certain enumerated reasons—to save a human life or to exercise a license in the real property context; to engage in experimental use in the patent context—then the breaking of the close was not a trespass. Blackstone and the Restatements are clear about this second stage. The conventional account of patent infringement is silent.

There remain two tasks. The first is to determine whether the actor's intention is at all relevant in the first stage of liability determination. Whether trespass involves an intention to perform the trespassory act, or an intention to trespass, or no intention at all except as justification, remains a matter of dispute. The second task is to discern how much of the law of trespass liability the Patent Act codifies, and how much of trespass doctrine the Act eschews. Both of those inquiries are beyond the scope of this Article. The important point is that, even at the liability stage of direct infringement determinations, where the conventional account stands on its surest footing, the actor's intention partly determines correct judgment.

### *B. Contributory Infringement*

Similarly, the key to understanding contributory infringement is to grasp what aspects of trespass law Congress changed when it enacted § 271(c)–(d) and what it did not change. Just as the intangible nature of patents can count either for or against strengthened patent protection in the law of direct infringement, that some indirect infringement seems more culpable than some direct infringement is by itself neither a reason to strengthen the intent requirement for direct infringement nor a reason to weaken it for indirect infringement. Insofar as the 1952 amendments codified the common law concerning contributory liability and continue to draw upon established, common law concepts of intention, culpability, and concerted action, it is not the requirement of a culpable state of mind in contributory infringement that requires explanation and justification. Rather, one would be surprised to find that intention is *not* relevant.

Liability for contributory infringement is well supported jurisprudentially in the forms of intentional and culpable infringement. Someone who has not broken the close has not trespassed in rem. But trespass in rem is underinclusive of wrongful actions against patent owners. To intend to assist another in trespassing or to knowingly facilitate a trespass is a wrong against the property of the owner. Similarly, Congress quite reasonably imposes liability for intentional and culpable acts that contribute to patent infringement.<sup>317</sup>

Contributory infringement can be understood as either intentional trespass or culpable trespass. A contributory infringer is jointly liable if he

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317. See 35 U.S.C. § 271(b) & (c).

shares the direct infringer's plan of action—if their action is concerted—a necessary aspect of which is an action that infringes the patent. Alternatively, even if the direct and contributory infringer share no wrongful intention, a derivative infringer who acts for the purpose—whether as means or end of his own plan, by inducement or contribution—of depriving the patentee of the benefits of his invention acts culpably in a sense that would have been actionable in trespass on the case.<sup>318</sup>

### C. *Multiple Damages and Equitable Relief*

At the liability stage, after validity of the patent and the infringer's wrong have both been established, an infringer is deemed to be aware of the patentee's rights and is responsible for continued infringements on that basis. When infringement is viewed as a species of trespass against property, the various perspectives from which one might view a patent converge on the imperative of multiple damages or equitable relief at the remedy stage. From the external perspective and from the internal points of view of both trespassers and patent owners, extra-compensatory relief is the fitting enforcement of adjudicated, valid patent rights.

A general presumption in favor of injunctive relief ought to apply to cases of continuing or repeated infringement, or the threat of a continued infringement.<sup>319</sup> From the better known external or observational perspective, which seeks to generalize about the nature and characteristics of rights and encompasses both an economic approach to law and a classical-liberal approach, the property-ness of a property right—whether its efficacy to produce efficiency or its dependence on the autonomous consent of the right bearer—makes damages an inadequate remedy for infringement.<sup>320</sup> Because liability rules undercompensate an owner who does not consent to the entry or use,<sup>321</sup> rules that are remedied by simple damages “are limited to those circumstances in which property rules work badly.”<sup>322</sup> As a general matter, patents are protected by the right to exclude,<sup>323</sup> which entails either injunctive relief<sup>324</sup> or some other sanction that mimics the incentives produced by injunctive relief.<sup>325</sup>

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318. See, e.g., *In Re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 1339-46 (Fed. Cir. 2012).

319. See Gergen et al., *supra* note 110, at 235-36.

320. Claeys, *supra* note 119, at 1041-43; Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1336-39 (1986); *Infringement Remedies*, *supra* note 226, at 831-32, 840-46, 850-63; *Property Rules*, *supra* note 249.

321. *Property Rules*, *supra* note 249, at 1730-31, 1740, 1753-85.

322. Epstein, *supra* note 225, at 2094.

323. *IP as P*, *supra* note 249; Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 76-85 (2009).

Those arguments are extant in the scholarly literature and understood by the Justices in *eBay*. Chief Justice Roberts tied the property-ness of patents to a presumption in favor of injunctive relief.<sup>326</sup> And Justice Kennedy assumed that such relief is generally available; he argued that such relief works badly in cases of strategic litigation.<sup>327</sup> Less well expressed by the Justices is that, in cases of intentional and culpable trespass, the same presumption in favor of injunctive relief is justified when one examines the equities from the internal point of view of either the infringer or the owner. The correlative duties and rights of the parties—in jurisprudential terms, their conclusive reasons for acting and omitting to act—are determined—settled and specified, clearly laid down without further qualification or contingency, clarified beyond reasonable questioning—from the moment that the validity and boundaries of a patent have been adjudicated. Once the respective obligations of the parties become definite and certain, “[e]quity regards as done what in good conscience ought to be done.”<sup>328</sup>

Since the merger of law and equity, the overriding concern of equity has been to afford just relief where a wrong causes “irreparable damage, not susceptible of complete pecuniary compensation.”<sup>329</sup> One factor that makes an injury irreparable by damages is an infringer’s culpable intention to continue the wrong. (The analogous concept from the external or observational perspective is what Henry Smith and others call “opportunism,”<sup>330</sup> which is the “use of the system in hard-to-foresee ways by better informed parties even at the expense of shrinking total surplus.”)<sup>331</sup> The King’s conscience has a long memory; equity still abhors bad-faith conduct.<sup>332</sup> The “traditional equitable considerations” that the Court expressly endorsed in *eBay*<sup>333</sup> include whether infringement was deliberate or willful, whether it was performed in culpable ignorance of the owner’s rights, and whether it persists after notice, as well as considerations weighing against an injunction, such as inequitable conduct

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324. *Infringement Remedies*, *supra* note 226, at 1728; *Property Rules*, *supra* note 249, at 1723–33.

325. Epstein, *supra* note 225, at 2100–01; *Property Rules*, *supra* note 249, at 1732–33.

326. *EBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring).

327. *Id.* at 396–97 (Kennedy, J., concurring).

328. *Carcione v. Clark*, 618 P.2d 346, 348 (Nev. 1980).

329. *Computing Scale Co. v. Nat’l Computing Scale Co.*, 79 F. 962, 964–65 (C.C.N.D. Ohio 1897) (quoting 2 CHARLES FISK BEACH, JR., MODERN EQUITY: COMMENTARIES ON THE LAW OF INJUNCTIONS AS DETERMINED BY THE COURTS AND STATUTES OF ENGLAND AND THE UNITED STATES § 1125 (1895)). See generally Gergen et al., *supra* note 110, at 233–37.

330. *Property Rules*, *supra* note 249, at 1774–85; Gergen et al., *supra* note 110, at 237–39.

331. Henry E. Smith, *Rose’s Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1050 (2011).

332. Gergen et al., *supra* note 110, at 240–41.

333. *EBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).



by the owner.<sup>334</sup> Indeed, culpability matters at least as much as the balance of hardships and the nature of the rights implicated.<sup>335</sup>

Equity's ambition to vindicate unique property estates against wrongful threats is the justification for specific performance of contracts for the purchase and sale of land<sup>336</sup> and other sources of affirmative duties. By the same logic, equity enforces abstention duties, such as the duties of self-exclusion and noninterference, where necessary to vindicate nonfungible rights.<sup>337</sup> What *should not* be done with respect to property *shall not* be done. If a trespasser "manifests an intention of persisting in the perpetration of unlawful acts" in execution of a "single plan or purpose" then damages are inadequate and equity should intervene to forbid future trespasses.<sup>338</sup>

In the patent context, equity's attention to the infringer's reasons for action commends a strong presumption in favor of injunctive relief in cases of intentional and culpable infringement<sup>339</sup> or infringement that amounts to unfair competition.<sup>340</sup> An infringer who is committed to a plan of action that entails continued infringement, as either an end in itself or means of achieving some more fundamental end, constitutes a persistent threat to the integrity of a patent claim as property. Decisions eschewing the traditional use of equitable relief in cases of willful or intentional infringement since *eBay* have simply ignored the foundational role that culpability plays in equity.<sup>341</sup> That the willfulness of infringement in those cases did not weigh in favor of an injunction is inexcusable in light of equity's traditional concerns.

Injunctions should generally issue after adjudication of the merits, because at that point in a proceeding the infringer is no longer ignorant of the patentee's rights.<sup>342</sup> Even where the initial infringement was not willful, continued infringement after adjudication of the patent's validity would be

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334. See, e.g., *City of Eureka Springs v. Banks*, 174 S.W.2d 947, 949–50 (Ark. 1943); *Malchow v. Tiarks*, 258 N.E.2d 811, 814–15 (Ill. App. Ct. 1970); *Heaton v. Miller*, 391 P.2d 653, 657–60 (N.M. 1964).

335. See *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595–96 (Colo. 1951).

336. *Carcione v. Clark*, 618 P.2d 346, 348 (Nev. 1980).

337. *Sanborn v. McLean*, 206 N.W. 496, 497–98 (Mich. 1925); *Tulk v. Moxhay* (1848) 41 Eng. Rep. 1143; 2 Phil. 774.

338. *Baker v. Howard Cty. Hunt*, 188 A. 223, 230 (Md. 1936).

339. *TiVo, Inc. v. EchoStar Commc'ns Corp.*, 446 F. Supp. 2d 664, 665, 670–71 (E.D. Tex. 2006), *rev'd in part on other grounds*, 516 F.3d 1290 (Fed. Cir. 2008).

340. *TiVo, Inc.*, 446 F. Supp. 2d at 669–70; Stephany A. Olsen LeGrand, Note, *eBay v. MercExchange: On Patrol For Trolls*, 44 HOUS. L. REV. 1175, 1209 & n.257 (2007).

341. See, e.g., *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 557–83 (E.D. Va. 2007); *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437 (E.D. Tex. 2006). See generally Andrew Beckerman-Rodau, *The Aftermath of eBay v. MercExchange*, 126 S. Ct. 1837 (2006): *A Review of Subsequent Judicial Decisions*, 89 J. PAT. & TRADEMARK OFF. SOC'Y 631, 656 (2007).

342. See Gergen et al., *supra* note 110, at 233–41.

intentional and should be enjoined. As the Supreme Court explained in *Continental Paper Bag*,

If the conception of the law that a judgment in an action at law is reparation for the trespass, it is only for the particular trespass that is the ground of the action. There may be other trespasses and continuing wrongs and the vexation of many actions. These are well-recognized grounds of equity jurisdiction, especially in patent cases . . . .<sup>343</sup>

Nor is the infringer being denied any rights by an injunction. “[O]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.”<sup>344</sup>

The patentee’s right and the infringer’s state of mind are not the only relevant considerations, and equity will not require an injunction in all cases of intentional and culpable trespass. Inequitable conduct by the patentee, such as delayed enforcement inducing reliance, will mitigate the justification for an injunction. But equity presumes that injunctive relief is appropriate and required where an infringer knows the boundaries of the patent claim and yet continues to infringe in deliberate violation of a duty of self-exclusion.

The same logic works in law as in equity. Precisely because trespass is a wrong, a jury or factfinder that finds intentional or culpable trespass has power in law to assess multiple damages, while innocent infringement ought to be limited to simple compensation. As the Supreme Court explained more than a century ago, the Patent Act contemplates that intentional and culpable trespasses upon an invention should be punished more severely than innocent infringements as a matter of natural justice.<sup>345</sup>

Experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits. The defendant who acted in ignorance or good faith, claiming under a junior patent, was made liable to the same penalty with the wanton and malicious pirate. This rule was manifestly unjust. For there is no good reason why taking a man’s property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages. It is true, where the injury is wanton or malicious, a jury may inflict

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343. *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 430 (1908).

344. *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 704 (Fed. Cir. 2008) (quoting *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986)).

345. *Seymour v. McCormick*, 57 U.S. 480, 488–89 (1853).

vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant.<sup>346</sup>

Because the Patent Act imposes direct infringement liability on innocent infringers, it makes good sense to reverse the traditional presumption and to require some evidence of a culpable state of mind before multiplying damages. But where that evidence supports a finding of willful infringement, punitive liability is both justified and proportionate to the wrong.

In the wake of the uncertainty generated by *eBay*, enhanced damages take on added significance.<sup>347</sup> An infringer who has expressed an intention to continue infringing in the future can be made to internalize some of the costs of that intended wrongdoing if required to pay enhanced damages. In this way, punitive damages can do the work that injunctions are widely thought to perform, protecting the patentee's right to exclude where compensatory damages are inadequate.<sup>348</sup>

## VI. CONCLUSION

The conventional account of trespass infringement cannot explain most of infringement doctrine, for intention is relevant at all but the very first stage of a direct infringement determination. The common-law forms of trespass better account for the various aspects of infringement doctrine. And trespass doctrine's different forms make sense as protections for a patent's various rights from the different perspectives of those who interact with patents.

The only aspect of contemporary infringement doctrine that does not fit the picture of infringement as trespass is the novel and controversial, four-factor interpretation of *eBay*. That interpretation is inconsistent with the historic conception of patent rights that the Court re-affirmed in *eBay* and with the traditional principles and maxims of equity that the Justices insisted they were not disturbing in *eBay*. In short, a conception of infringement as trespass is more consistent with the rights of patents and the requirements of equity than the conventional account. And it better resolves the problems which the four-factor interpretation of *eBay* leaves unresolved.

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346. *Id.*

347. *See Newman, supra note 323, at 69.*

348. *See Applegate, supra note 119, at 85.*