

THE TRESPASS FALLACY’S LIMITS—

A RESPONSE TO ADAM MOSSOFF

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In his engaging new essay, *The Trespass Fallacy in Patent Law*, Professor Adam Mossoff challenges the reasoning of prominent scholars, lawyers, judges, and policymakers who criticize the patent system on the basis that patent claims are not as clear and determinate as real property boundaries.¹ This “indeterminacy critique,” writes Mossoff, is “deeply mistaken” because it is based on the flawed assumption that patents should function “just as *trespass doctrine* does in real property—[and that] the former should be as clear and as determinate as the latter.”² According to Mossoff, this assumption (the trespass fallacy of his essay’s title) is conceptually flawed because it makes a direct analogy between patents and land, when a patent’s proper conceptual counterpart is the *estate*, which is defined by the deed.³ The significance of this correction is that when comparing patent rights to real property rights, we must consider all claims—not just trespass claims—that relate to boundary disputes over estates: e.g., adverse possession, easements, restrictive covenants, and nuisance.⁴ Any of these claims could give rise to costly legal disputes and arguments over the proper interpretation of the terms used in deeds, not unlike “the linguistic fights in patent law over the meaning of claim terms.”⁵ The trespass fallacy is also empirically flawed because it relies on an unproven assumption that real property disputes over estate boundaries are rare and efficiently resolved.⁶ But, if we were to gather the data on these disputes—especially if we were to take all relevant doctrines into account—our idealized perception of real property disputes might collapse, and the patent system would not look so bad in comparison.⁷

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1. Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1695 (2013) (quoting Tun-Jen Chiang, *Fixing Patent Boundaries*, 108 MICH. L. REV. 523, 525 (2010)).

2. Mossoff, *supra* note 1, at 1691.

3. *Id.* at 1698.

4. *Id.* at 1707.

5. *Id.*

6. *Id.* at 1692, 1704–10.

7. *Id.* at 1704–09. Professor Mossoff notes that he is in good company in suspecting that real property boundaries are costly. He cites Justice Breyer’s statement that “property owners litigate many thousands of cases involving state property law in state courts each year,” many of which involve state property law issues “of considerable complexity.” *Id.* at 1705 (quoting *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2619 (2010) (Breyer, J., concurring)). Professor Mossoff’s suspicion is also consistent with the conclusions of property scholars, who have often complained that the common law doctrines governing estate boundaries impose significant legal costs because of their complexity. *See, e.g.*, Susan F. French, *Servitudes*

Professor Mossoff's essay astutely identifies an important weakness in the writings of some of the patent system's most vocal critics, and more broadly, a weakness in the property literature.⁸ The empirical gap Professor Mossoff identifies is significant for reasons beyond those he gives in the essay. Leading property scholars, including Professors Thomas W. Merrill and Henry E. Smith, have argued that features of the property system operate to manage its complexity by reducing information costs.⁹ Although Professors Merrill and Smith are quick to argue that the actual system is not necessarily optimal,¹⁰ the costs of this system have not been measured. Thus, Professor Mossoff's proposal for empirical research, if heeded, could provide a baseline for assessing these theories and suggesting improvements.

However, we worry that Professor Mossoff's conclusion that patent reform should be postponed until this empirical weakness is resolved¹¹ overestimates the significance of the trespass fallacy. Rejecting the trespass fallacy provides a reason to suspend proposals for patent reform in only one case: when someone believes that patents' proper standard of comparison is property rights, and that the patent system should be reformed because patents are so vague and indeterminate that they fail this comparison. Professor Mossoff provides several examples where commentators appear to make this claim.¹² However, as the examples

Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, 73 CORNELL L. REV. 928, 928–29 (arguing that “the law governing servitudes is a mess” because of the common law development of judicial controls and transactional forms).

8. See Mossoff, *supra* note 1, at 1695.

9. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 40, 64 (2000); see also Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (arguing that property law is organized into independent modules to minimize information costs).

10. See Merrill & Smith, *supra* note 7, at 8; Smith, *supra* note 9, at 1710.

11. Mossoff, *supra* note 1, at 1711 (“Until firm factual grounding for this normative critique is . . . established, commentators, legislators and courts might want to pause before continuing to make fundamental structural changes to the American patent system.”).

12. Professor Mossoff's scholarly examples include Professors James Bessen, Michael Meurer, and Tun-Jen Chiang. *Id.* at 1694–95. A quick search reveals similar reasoning among other prominent scholars. For instance, in her popular book, *Rethinking Patent Law*, Professor Robin Feldman argues that “the fundamental nature of the patent system is such that no matter how brilliantly we design and apply the rules, the patent cannot definitively identify the rights granted” because “[t]here is simply not enough information at the time of the patent grant.” ROBIN FELDMAN, *RETHINKING PATENT LAW* 5 (2012). She likens the patent system to a real property system in which “the government is selling property but the property is not set from the start. We cannot walk the property or know what we are handing over.” *Id.* Similarly, Professor Herbert Hovenkamp, a leading intellectual property and antitrust scholar, claims that “[i]nsofar as competition policy is concerned, some of the biggest shortcomings of the patent system relate to its status as a system of property rights.” Herbert Hovenkamp, *Patents, Property, and Competition Policy*, 34 J. CORP. L., 1243, 1248 (2009). The property theory of patents is problematic, he explains, because boundaries and priority are “essential to an enforceable, useful system of rights,” but “much of patent/antitrust

below demonstrate, there are many bases for reforming the patent system that survive.

First, some criticisms of the patent system have little to do with an analogy to real property. The most obvious example is the recent outcry over so-called patent trolls: non-practicing entities that litigate but do not supply products or services based on patents.¹³ Although critics of trolls may raise the indeterminacy critique at the same time, they do not rely on an express or implicit appeal to how well trespass doctrine works in real property law as compared to patent law. Whether or not we agree with them, there are entirely independent theoretical reasons for objecting to patent holders that do not practice their inventions but sue those that do.¹⁴

Second, the real property analogy generates other criticisms of the patent system that are unrelated to the indeterminacy critique. Professors Michael Heller and Rebecca Eisenberg argue that patent practices should be reformed because intellectual property inherits some of real property's dysfunctions.¹⁵ They argue that just as fragmented ownership of real property can result in prohibitive transaction costs and underuse of that property, patents can create a "tragedy of the anticommons through a proliferation of fragmented and overlapping intellectual property rights."¹⁶ This tragedy of the anticommons is not unique to intellectual property, but can arise in any property regime where "too many individuals have rights of exclusion in a scarce resource."¹⁷ Critics of the anticommons critique argue that it too is unsupported by empirical evidence.¹⁸ We do not

doctrine arises because these ordinary and essential property limitations *are so poorly defined within the patent system.*" *Id.* (emphasis added).

13. See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION (June 2013) at 9 ("[T]he harassing litigation tactics of some [non-practicing entities], combined with substantial litigation costs . . . have added significant costs to the innovation ecosystem and sapped investments in research and development, causing great harm to society.").

14. See John F. Duffy, *Reviving the Paper Patent Doctrine*, 98 CORNELL L. REV. 1359 (2013) (arguing that courts should revive the "paper patent" doctrine to reward or penalize patent owners that do or do not practice, respectively). See also Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1672 (2011) (arguing that the standard of patentability should take into account the extent to which an invention achieved commercial success through some level of effort by the patent holder, while "[e]vidence of commercialization by others would point in the opposite direction [invalidity or narrower scope] if it seemed that the others had developed the invention independently, another secondary consideration").

15. Michael Heller & Rebecca Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698–99 (1998).

16. *Id.* at 701.

17. Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 667 (1998). See also MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 1-22 (2008) (identifying numerous examples of the tragedy of the anticommons in intellectual and real property).

18. See, e.g., Richard A. Epstein & Bruce N. Kuhlik, *Is There a Biomedical Anticommons?*, REGULATION, Summer 2004, at 54.

presume to resolve this debate, but raise the anticommons critique to demonstrate that intellectual property's *similarities* to real property, no less than its differences, can motivate powerful critiques of the patent system.

Finally, some of patent law's most vocal critics reject the notion that patents are property rights for reasons entirely separate from the indeterminacy critique. According to Professor Mark Lemley, treating intellectual property like real property is a mistake not simply because patents' validity and scope are uncertain prior to litigation,¹⁹ but because the traditional utilitarian justification for creating a property regime—that property rights simultaneously force owners to internalize the costs of their activities and permit them to internalize the benefits—should not apply with equal force to intellectual goods that can be re-used productively without depleting their value.²⁰ Some critics, such as Professor Brett Frischmann, therefore propose alternative forms of incentives, such as grants, prizes, and tax credits, to provide similar incentives to generate intellectual goods without eliminating the positive social spillovers associated with cumulative innovation.²¹

Notwithstanding these reservations, Professor Mossoff's critique of the trespass fallacy provides an important service: reminding commentators who do not believe the trespass fallacy's premises to stop writing as if they do. More generally, Professor Mossoff's essay reminds us that many of our assumptions about the property system remain underresearched.

19. Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSPECTIVES 75, 76 (2005).

20. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032, 1060–65 (2005) (arguing that giving inventors or creators control over all the positive externalities associated with their inventions produces various costs including fewer incentives to improve existing technologies). See also Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 276 (2007) (“As long as we get enough incentive [to innovate,] the fact that other benefits aren’t captured by the innovator doesn’t impose any real cost on innovation, and may even contribute to innovation.”).

21. See, e.g., Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 TEX. L. REV. 303, 362 (2013); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond IP Internalism*, 59 U.C.L.A. L. REV. 970, 988 (2012).