

COGNITIVE ECONOMY AND THE TRESPASS FALLACY: A RESPONSE TO PROFESSOR MOSSOFF

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In his recent essay *The Trespass Fallacy in Patent Law*, Professor Adam Mossoff argues cogently that the metaphor of trespass has become a misused basis for patent indeterminacy critiques that it cannot conceptually or empirically support.¹ While sharing his caution that metaphors are not to be trifled with, this reply suggests that trespass has both a smaller role and a larger potential benefit in the debate on patent indeterminacy, and advances an opposite solution.

Patent protection must continually resolve not one, but two subjects of indeterminacy: notice and teaching. Professor Mossoff's essay addresses critiques about the notice function of patents, which is to inform the public about the boundaries of a patent's rights to exclude others from practicing the disclosed invention.² Related to notice is the teaching function of patents, which is to educate the public about what the invention is and how to practice it.³ Put another way, claims that deliver proper notice of boundaries are precise proxies for the invention, and claims that deliver proper teaching are accurate proxies.⁴

For its part, the teaching function draws analytical and rhetorical force from a different metaphor: that of a contract between inventor and society in which the bargained-for exchange is that an inventor conveys adequate disclosure about an invention and society conveys in return a limited right to exclude others from practicing it.⁵ This bargain guards

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1. Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687 (2013).

2. See, e.g., *Ariad Pharm., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1347 (Fed. Cir. 2010) (observing that giving such notice is the "principal function" of patent claims).

3. See, e.g., *Univ. of Rochester v. G.D. Searle & Co., Inc.*, 358 F.3d 916, 922 n.5 (Fed. Cir. 2004) (distinguishing descriptive notice about the nature of the invention from prescriptive notice about what the patent confers a right to exclude others from doing).

4. See Oskar Liivak, *Rescuing the Invention from the Cult of the Claim*, 42 SETON HALL L. REV. 1, 42 (2012) ("In short, the disclosure requirements of § 112 ¶ 1 ensure that the claims are accurate proxies for the invention while the indefiniteness requirement housed in § 112 ¶ 2 ensures that they are precise proxies.").

5. See, e.g., *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 63 (1998) (describing the patent system as "a carefully crafted bargain"); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (describing disclosure as "the *quid pro quo* of the right to exclude"). The Supreme Court has further noted that the metaphor of bargained-for exchange is particular to patents. See *Eldred v. Ashcroft*, 537 U.S. 186, 216 (stating that "our references to a *quid pro quo* typically appear in the patent context.").

against the undersupply of knowledge that would otherwise result from the high fixed cost of creating knowledge and the low marginal cost of copying it.⁶ Indeed, the language of contract further informs whether notice of patent boundaries is enough to satisfy the public’s “reliance” interest on sources of boundary notice such as the prosecution history of a patent’s examination.⁷ Critiques of patent indeterminacy adopt the trespass metaphor only as to the violation of the patent right⁸ and only to describe the violation, not to evaluate it. As to the creation of patent rights, the justification for their scope, and the normative effects of their violation, it is the contract metaphor—a patentee asserting exclusionary power out of proportion to the contribution that the patent offers in exchange—that predominates.

This cabined use of trespass is a clue to its value. The language of trespass appears and appeals in patent law, and other legal domains such as cyberspace law,⁹ because it offers for doctrinal debates a cognitive economy based on what preeminent metaphor theorist George Lakoff described as a cognitive conceptual system shared among all humans.¹⁰ Thus, to seek conceptual symmetry between patents and real property, as Professor Mossoff suggests, is appropriate, but doing so by abstracting arguments up to the generality of patent estate boundaries discards the very cognitive economy that makes trespass a conceptually useful metaphor at all. To be sure, it is an empirical question whether and to what extent trespass is a truly communal cognitive metaphor akin, e.g., to Lakoff’s example of argument as war.¹¹ Yet on this point, Professor Mossoff’s normative argument that the trespass fallacy obscures patent policy on a large scale suggests at least his descriptive agreement that the metaphor of trespass is widely enough accepted to do such damage.

6. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 994–95 (1997).

7. See *Biogen Idec, Inc. v. GlaxoSmithKline LLC*, 713 F.3d 1090, 1095 (2013) (noting that prosecution history “promotes the public notice function of the intrinsic evidence and protects the public’s reliance on definitive statements made during prosecution”).

8. Professor Mossoff himself notes this limitation. *Mossoff*, *supra* note 1, at 1697 (framing trespass as merely “a single doctrine that provides redress for a particular way the legal right [of real property] is violated”).

9. See, e.g., Dan Hunter, *Cyberspace As Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 445 (2003).

10. GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR 50 (1989), *cited in* Hunter, *supra* note 9, at 469–71. Hunter explains a Lakoffian mapping between a target domain describing the principal subject of a metaphor and a source domain from which the metaphor draws salient features and attributes them to the target. Hunter, *supra* note 9, at 467–68.

11. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 4 (1980).

The better solution, then, is to ask what subsidiary doctrine of patent law is commensurate in analytical scope with the doctrine of trespass in real property. A reasonable answer to this question may be, direct infringement of the right to exclude another from making the patented invention or performing the patented process. Direct infringement is the simplest violation of a patent right, and consists only of doing without the patent owner's permission something that the patent owner can exclude others from doing.¹² Moreover, while the activities excludable by a patent are making, using, offering for sale, and selling, it is the particular right to make an invention—or, for a process, the right to perform it—that is of greatest relevance in the current debate.¹³

This scaling-down still presents empirical difficulty in comparing uncertainty for the physical boundaries of real estate against trespass with uncertainty for the prescriptive boundaries of a patent claim against direct making or performing. For example, physical boundaries of real estate are possible to determine *ex ante* by reference to fixed principles of surveying, making trespass more a quantifiable risk. By contrast, principles of patent claim construction are not as well fixed for *ex ante* resolution, subjecting the determination of claim boundaries more to a form of Knightian uncertainty.¹⁴ But this difficulty is at least partly tractable by the use of proxies for uncertainty in the patent right, such as changes in market valuation of the patent owner in response to judicial resolutions of legal uncertainty through adjudication.¹⁵

Importantly, the need for adequate public notice persists even at this greater level of specificity about a particular patent doctrine (direct infringement) as to a particular right (to exclude others from making the patented invention or performing the patented process). In this regard, the comparison to trespass is particularly illustrative because, whereas

12. See 35 U.S.C. § 271(a). Direct infringement is distinguishable from indirect forms of infringement such as actively inducing others to infringe or contributing to others' infringement through the sale of a component or enabling material or apparatus that is made or adapted for use in the infringement and has no substantial noninfringing use. See 35 U.S.C. §§ 271(b)–(c).

13. The right to offer for sale or sell and the right to use, respectively, implicate liability for intermediaries in the stream of commerce and liability for end users. These are important dimensions of the patent reform debate, e.g., Brian J. Love & James C. Yoon, *Expanding Patent Law's Customer Suit Exception*, 93 B.U. L. REV. 1605, 1610–13 (2013), but are ultimately superseded by complaints about the threat to economically productive manufacturing operations from patents of indeterminate scope.

14. For a discussion of Knightian uncertainty—uncertainty which cannot be measured, as distinct from risk, which can—see generally FRANK H. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* (1921).

15. See Alan C. Marco & Saurabh Vishnubhakat, *Certain Patents*, 16 YALE J.L. & TECH. 103, 104 (2013).

trespass to land requires some level of intent,¹⁶ patent infringement is widely regarded as a strict liability offense¹⁷ and arguably warrants an even more robust level of notice to justify the imposition of liability.

In sum, while Professor Mossoff advances a valid conceptual and empirical criticism of patent indeterminacy arguments, his proposal for symmetry between patents and real property would benefit from greater appreciation for the cognitive economy that the trespass metaphor offers. Without it, arguing broadly about patent estate boundaries would make the patent indeterminacy debate still more incoherent. Specifying what doctrines of patent law are truly analogous to trespass would make the trespass metaphor a more meaningful policy heuristic, and lend greater discipline to the rhetoric of patent failure.

16. See Restatement (Second) of Torts § 158 (explaining that unauthorized entry with intent creates liability even if the possessor of the land suffers no harm); *id.* § 166 (explaining that an entry that is unintentional and non-negligent does not create liability even if the possessor suffers a resulting harm).

17. *E.g., In re Seagate Technology, LLC*, 497 F.3d 1360, 1368 (2007).