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INTENT IN PATENT INFRINGEMENT

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In *An Intentional Tort Theory of Patents*, Professor Vishnubhakat makes two arguments. First, that liability for patent infringement should only be imposed upon defendants who intentionally make, use, or sell, patented inventions. And second, that if patent infringement includes such an intent requirement, it would no longer be a strict liability tort. This response agrees with the first thesis: patent infringement should require intentional conduct of a certain sort. However, the response disagrees with the second thesis: even if patent infringement requires such intent, liability would, in my view, still be “strict.”

I. INTENT

The Patent Act grants a patent holder the exclusive right to make, use, and sell its patented invention.¹ Making, using, or selling a patented invention without the permission of the patent holder is a tort, i.e. a civil wrong for which the patent holder can claim a remedy.² Professor Vishnubhakat’s first claim is that this tort should be an “intentional tort.”³ Professor Vishnubhakat argues that courts ought to impose liability only upon defendants who *intentionally* make, use, or sell patented inventions.⁴ For example, imagine a pharmaceutical company, Pharma Inc., is trying to produce chemical A, but in the course of making that substance, the company unwittingly sets off a reaction that produces chemical B, for which a patent is held by another company. Professor Vishnubhakat argues that Pharma Inc. should not be held liable for infringing the patent on chemical B because it lacked the relevant intent: while it clearly produced the patented chemical, it did not intend to do so.⁵ Note, Professor Vishnubhakat is not arguing that *intent to infringe* a patent should be a necessary condition for liability. He is not saying that Pharma Inc. was unaware of the patent and therefore ought not to be held liable. His argument is that the company did not intend *to use the thing that is subject to the other company’s patent* and for that reason, should

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1. 35 U.S.C. § 271(a).

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (W. Page Keeton ed., 5th ed. 1984).

3. Saurabh Vishnubhakat, *An Intentional Tort Theory of Patents*, 68 FLA. L. REV. 571, 610 (2016).

4. *Id.* at 611–14.

5. But note, if after unintentionally making chemical B, Pharma Inc. then decides it could use the new substance, it would presumably be liable under Professor Vishnubhakat’s scheme.

not be held liable.⁶

If patent law were to adopt this intentional conduct requirement, then, of course, patent infringement would be an “intentional tort” in line with other intentional torts. As defined by courts, “intentional” torts generally require an intent to produce a certain kind of consequence (rather than a mere intent to undertake an action, irrespective of its consequence),⁷ but do not require the defendant to act with an intent to engage in unlawful conduct. For example, trespass to land, an intentional tort,⁸ sets as a condition of liability that the defendant intended to enter or occupy the land in question. In other words, the defendant must “intend to make physical contact with a particular swath of land, and he must succeed in making such contact” before a court will find a trespass.⁹ The cause of action does not require, however, that the defendant intend to violate another’s property rights. For example, someone who intentionally enters land reasonably believing it to be her own property would still be a trespasser, although she did not intend a wrong. If patent infringement were to require intentional conduct of the sort Professor Vishnubhakat has in mind, it would be an intentional tort in the same way that trespass to land is an intentional tort.

Professor Vishnubhakat argues persuasively that patent infringement should (and to some extent already does) require such intentional conduct.¹⁰ Citing corrective justice and civil recourse literature, Professor Vishnubhakat argues that a meaningful level of human agency is necessary before someone ought to be liable for losses caused to others, and this should be true in patent law as much as any other area of tort law.¹¹ The Article is most compelling however, when it turns to the practical problems that the intent standard would alleviate. Consider, for example, the “Makers vs. Sellers vs. Users” problem.¹² Imagine that a manufacturer produces a new tablet computer that incorporates a patented microprocessor without a license. The tablet is then sold by a downstream

6. Indeed, even if Pharma Inc. was aware that chemical B was invented, Professor Vishnubhakat would presumably argue that the company still should not be liable because it nevertheless did not intend to make chemical B.

7. See RESTATEMENT (SECOND) OF TORTS § 8A (1965).

8. *Id.* §158.

9. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 232 (Dennis Patterson ed., 2010).

10. See Vishnubhakat *supra* note 3 at 611. Professor Vishnubhakat’s argument is fairly described as an interpretive legal theory. His argument is not merely that patent infringement should require intent, but that the values underlying patent infringement *already require* infringement to require intent. The intent standard he envisions not only “fits” (broadly) with the pre-existing law, but it coheres with the set of principles which “justify” this regulation in the first place. See *generally* RONALD DWORKIN, LAW’S EMPIRE 45–46 (1986) (describing the debate of semantic theories of law).

11. See Vishnubhakat *supra* note 3 at 590–91.

12. See *id.* at 611–14.

retailer and used by an end-user, both of whom are unaware the tablet contains the microprocessor. If patent-infringement liability is imposed upon anyone who simply makes, uses, or sells patented invention, then the manufacturer, retailer, and end-user are each directly liable (although each would pay a different amount in damages). To many patent lawyers, this seems simply wrong. Many intuitively see the retailer and end-user as insufficiently blameworthy to be held responsible for patent infringement in this scenario. If patent law were to adopt an intentional conduct requirement, however, then the result would likely be different and better fitting with our intuitions. While the manufacturer would be liable, the retailer and end-user would likely not, on the grounds they did not intend (in the sense used by Professor Vishnubhakat) to sell or use the microprocessor. It is pragmatic arguments, such as this one, which make Professor Vishnubhakat's proposal attractive.

Nevertheless, the argument could benefit from a stronger theoretical grounding. An intentional conduct requirement would likely fulfill the economic efficiency goal of patent law. As public goods, inventions may be under-produced. Patent rights aim to overcome this market failure. Users of the invention are expected to negotiate *ex ante* for permission to use the invention. Through bargaining, the benefit produced by the invention is internalized to the patent holder, thus creating appropriate incentives to invent (the dynamic efficiency rationale). However, such *ex ante* bargaining cannot occur when the user is unaware she is using the invention. For example, Pharma Inc. in the example above cannot *ex ante* negotiate for permission to make chemical B because it does not expect to create chemical B. In a case like this, private bargaining cannot internalize the benefit to the inventor. As a result, society must use *liability* to internalize this benefit. And therein lies the rub: unlike bargaining, liability is not cheap. Allowing the patent holder to sue the unintentional user for a remedy requires lawyers, evidence, a court to hear the claim, and someone to enforce the judgment. The question for policy makers is, therefore: Would the benefit of internalization here be greater than its costs? To which the answer is: probably not! Professor James Bessen and Professor Michael Meurer recently conducted "the first comprehensive empirical evaluation of the patent system's performance."¹³ The investigation found that the costs of the patent system outstripped its benefits, and concluded that the patent system is "broken."¹⁴ In particular, the "explosion" in the patent system's cost was due to the high expenditure on patent litigation.¹⁵ My hunch is, therefore, that in cases of unintentional infringement, the gains of internalization

13. JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 3 (2008).

14. *Id.* at 5.

15. *Id.* at 24.

created by liability will be smaller than the litigation costs such liability would create. On the balance of probabilities, it would be a more efficient use of resources to withhold liability in cases of unintentional infringement. These are cases where, as Oliver Wendell Holmes once said, the “loss from accident must lie where it falls.”¹⁶

II. STRICT LIABILITY

Adopting an intent-to-produce-the-item-that-infringes requirement is a sensible idea. But if this proposal is adopted, would patent infringement still be a strict liability tort? Professor Vishnubhakat says no. The Article’s second thesis is that if patent infringement is an “intentional tort” in the sense that it uses that term, then it must be a form of fault liability.¹⁷ On this point, I am less convinced. My view is that even if intentional conduct is required, liability would still be “strict.” Nevertheless, reasonable minds may differ on this point, and there is substantial evidence to support Professor Vishnubhakat’s view.

One might think this question should have an easy answer. In essence, the Article argues that patent infringement cases should be governed by similar rules as trespass to land cases. Accordingly, if liability in trespass is “strict” then so would be patent infringement. But here we run into a difficulty: there is no consensus on whether trespass to land is “strict” liability or not. Certainly, some cases refer to trespass as a “strict liability tort,”¹⁸ as do some treatise writers.¹⁹ And, on some historical accounts, “fault liability” was a nineteenth century innovation that departed from strict liability with which “trespass” was synonymous.²⁰ On the other hand, this characterization conflicts with the tripartite division of torts. Tort lawyers usually divide torts into three mutually exclusive categories: intentional torts, negligence, and strict liability.²¹ The first two categories together make up the broader category of “fault liability.”²² But if trespass to land is an “intentional tort,” surely that means trespass is fault

16. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 94 (1881).

17. See Vishnubhakat *supra* note 3 at 618.

18. See, e.g., *Burns Philp Food, Inc. v. Cavalea Cont’l Freight, Inc.* 135 F.3d 526, 529 (7th Cir. 1998) (“Trespass is a strict liability tort . . .”).

19. 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 51 (2001) (“Since the intent required to show a trespass is only an intent to enter land, and since that intent might be wholly innocent, the rules may sometimes impose a limited kind of strict liability.”).

20. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, 123–143 (1992) (discussing the displacement of strict liability by the negligence standard as the norm in American tort law in the mid-nineteenth century).

21. See Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 *Ariz. L. Rev.* 1061, 1079 (2006).

22. See *id.*

liability.²³ Following this reasoning, some lawyers do think of trespass as requiring “intentional fault.”²⁴ Clearly, therefore, when thinking about the liability imposed in cases of patent infringement, looking to trespass will not provide any easy answers. The confusion that we find in trespass simply is exported to the arena of patents. Answering this question requires, therefore, a theory of the distinction between fault and strict liability.

Interestingly, two of the most prominent theories of the strict/fault liability divide support Professor Vishnubhakat’s view. The first comes from Jules Coleman.²⁵ Coleman argued that strict liability is liability imposed when the injurer’s action causes cognizable loss to the victim, whereas in fault liability the injurer’s “fault” must cause the loss. Fault exists in two cases: first where there is fault in the *action* (or fault in the *doing*) and second, where there is fault in the *actor* (or fault in the *doer*).²⁶ In the first instance, the fault is failing to conform to a standard society expects of the defendant—such as the requirement to take reasonable care to prevent harm to others. In the second instance, the fault exists where the “conduct exemplifies some shortcoming in [the actor], usually a defect in character or motivation.”²⁷ Coleman suggests that intentional conduct is a type of fault in the actor.²⁸ He writes: “It is not a condition of intentional torts that the person intended to do harm or to act wrongfully, that is, to act in violation of some rule or standard. Rather, someone commits an intentional tort if she intends to perform some act, does perform it as a result of her intending to, and the act is wrong under some description of it.”²⁹ Under this standard, trespass is, and patent infringement would be, fault liability.

However, I find this argument problematic. While the distinction between fault in the actor and fault in the action is helpful, I doubt that intentional conduct is truly a fault in the actor. Does liability in trespass require some “shortcoming” in character or motivation? I do not think so. The desire to walk on a plot of land, or to make a chemical substance, is

23. Although, some do suggest the categories are not mutually exclusive, and that one can be strictly liable for intentional torts. See generally William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT’L REV. L. & ECON. 127 (1981); Keith Hylton, *Intent in Tort Law*, 44 VAL. U. L. REV. 1217, 1226 (2010) (explaining when intentional torts are strict).

24. See generally Allan Beever, *The Form of Liability in the Torts of Trespass*, 40 COMMON L. WORLD REV. 378 (2011) (describing the frequently held belief that trespass requires intentional fault).

25. See JULES L. COLEMAN, *RISKS AND WRONGS* 212–33 (1992).

26. *Id.*

27. *Id.* at 217.

28. I say “suggest” because Coleman does not say explicitly into which category of fault intentional torts fall into. Nevertheless, I read him as saying intentional torts are of the fault in the *actor* type.

29. *Id.* at 218.

not, in my mind, a character flaw. I think a character flaw is only exhibited when the defendant performs this conduct knowing it to be legally wrongful, as in the famous case of *Jacque v. Steenberg*.³⁰

A second theory that aids Professor Vishnubhakat is described by John Goldberg and Benjamin Zipursky.³¹ Goldberg and Zipursky explain that, according to “prevailing academic usage, strict liability is liability *without wrongdoing*.”³² Liability is strict when it is imposed upon a defendant who causes the plaintiff harm.³³ By contrast, fault liability requires *wrongdoing* in the sense that the defendant must fail to comply with “an applicable standard of conduct.”³⁴ Under this theory, trespass to land is a type of fault liability.³⁵ The *wrongdoing* in trespass is the invasion of the landowner’s right to exclude others.³⁶ The landowner’s entitlement sets a standard of conduct to which others must conform (we must keep off the land of others) and failure to meet that standard is a form of wrongdoing for which liability will attach.³⁷ Of course, Goldberg and Zipursky explain this theory in order to expose its flaws. The ultimate purpose of Goldberg and Zipursky’s work is to show that the fault/strict liability distinction is a “false dichotomy.”³⁸ As they argue, most cases of fault liability, or liability with wrongdoing, is strict in the sense of imposing liability in a “demanding or unforgiving manner.”³⁹ Likewise, only a very small corner of tort law—liability for abnormally dangerous activity—imposes liability without any real wrongdoing.⁴⁰ Nevertheless, the prevailing academic theory they discuss does provide support for Professor Vishnubhakat’s view. Much like trespass, the patent holder’s exclusive right to use the invention sets a standard of conduct with an accompanying legal directive to others (“Don’t use without permission!”). Liability for infringement requires wrongdoing in the sense that the defendant must violate this exclusive entitlement.

However, this theory also is problematic for Professor Vishnubhakat’s theory. Under this theory, patent infringement is already fault liability, regardless of the intentional conduct standard. The patent holder’s

30. 563 N.W.2d 154, 157 (Wis. 1997).

31. See John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743 (2016).

32. *Id.* at 745.

33. *Id.*

34. *Id.*

35. *Id.* at 748.

36. *Id.* (“So long as there has been the requisite *invasion*, the wrong has been committed”) (emphasis added).

37. *Id.*

38. *Id.* at 743.

39. *Id.* at 745.

40. See RESTATEMENT (THIRD) OF TORTS § 20 (2001).

exclusive right is to make, use, or sell the invention. One does wrong to the patent holder simply by performing one of these acts. It seems to me, therefore, that even before we discuss the issue of intent, liability for patent infringement must rest on some form of *wrongdoing*. While supporting Professor Vishnubhakat's view that patent infringement is not really strict liability, it negates his argument that *intentional conduct* is what makes patent infringement fault-based.⁴¹

Finally, this is my view: when someone acts contrary to the rights of another, they do wrong to that person. It is a sad fact of life that we commit such wrongs all the time: we enter their land, we damage their chattels when we bump their cars in traffic collisions, and we make false statements that harm reputations. When such a wrong occurs, it is the role of tort law to determine who, if anyone, should be held responsible.⁴² In particular, when a plaintiff shows a defendant has interfered with her rights, the question for tort lawyers is: Should the defendant be held responsible for this wrong? As a basic matter, we only hold a defendant responsible for a wrong if there was a certain level of human agency involved in the wrongdoing. In some cases, such as trespass to land, that is all the law requires—we require *only* that the defendant intentionally contacted land in a manner that happens to interfere with rights before holding the defendant responsible for the property violation.⁴³ These are wrongs for which someone will be held strictly liable. In other cases, liability is less strict. Fault liability requires not only that the defendant wronged another person as a result of their purposeful action, but that they intended that wrong, or at least failed to take reasonable care to

41. Elsewhere, while discussing property damage caused by abnormally dangerous behavior, Goldberg and Zipursky write that liability does not hinge “merely on *injury*, but on injury that is the realization of *misconduct*.” *Id.* at 757 (emphasis added). If we think about this statement in the context of trespass, it might lend support for the idea that the *invasion* of the right to exclude is not itself the *wrongdoing*, but instead the intentional conduct requirement is the misconduct which makes liability fault-based. This might provide more support for Professor Vishnubhakat's view that the intentional conduct standard is truly what makes patent infringement fault-liability. But I find this problematic for the similar reasons explained in response to Coleman's theory. That is, is intentionally walking on land a form of misconduct? Is there a standard of conduct that says “don't walk on land?” or “don't use inventions?” Not to my knowledge! If the *injury* or the *rights-invasion* is therefore not the wrongdoing itself, then I don't see the intentional conduct standard as supplying an adequate alternative.

42. Accordingly, I see “torts as wrongs.” See generally John C.P. Goldberg & Benjamin Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (arguing that that torts are best understood as a law of wrongs and recourse rather than a system for allocating the costs of accidents). But I do not see the conceptual core of tort law as defining wrongdoing. I see wrongs-definition as being supplied by sources mostly outside of tort law (such as property law, constitutional law, or human rights). The unique core of tort law, in my mind, lies in its ability to determine the conditions under which someone ought to be responsible for such wrongs.

43. See RESTATEMENT (THIRD) OF TORTS § 20 (2001).

prevent it. Liability for road traffic accidents or fraudulent misrepresentation, for example, is not strictly imposed because it requires a lot more than a mere showing that the defendant acted contrary to the plaintiff's rights.⁴⁴

From my perspective, therefore, liability in patent infringement cases would still be strict even if patent lawyers unequivocally confirm that intentional conduct is necessary. Liability would be strict in the same way trespass to land, in my view, is. By contrast, if patent lawyers discard the intentional conduct standard, then liability will not be strict, but it will be a very unique form of *ultra-strict* liability which arguably does not conform to our usual notions about responsibility. One of the virtues of Professor Vishnubhakat's Article is it exposes how unusually strict patent infringement would be if it did not require intentional conduct.

CONCLUSION

In sum, Professor Vishnubhakat provides a pragmatic and normatively attractive proposal to make patent infringement an "intentional tort." However, more drastic reform would be required before patent infringement, in my mind, would be a fault-based tort. Whether such reforms should be made is a question for another day.

44. See 8 AM. JUR. 2D *Automobiles* § 1044 (2017); 37 AM. JUR. 2D *Fraud and Deceit* § 27 (2017).