

ABSTRACT

Land Patents

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The conventional wisdom is that the patent system is failing as a property system. This conclusion is often based on a comparison between patents and trespass doctrine. On one hand, patents are deemed to be vague, indeterminate, and inordinately expensive to obtain and to litigate. On the other hand, trespass doctrine is clear, determinate, and efficient. Thus, the conclusion seems inescapable: the patent system is fundamentally broken.¹

This paper maintains that the use of trespass doctrine as the foil by which to evaluate the patent system is fundamentally mistaken on both empirical and conceptual grounds. This unduly narrow conception of property—what I call “property as trespass”—has perpetuated basic myths within the patent community about the nature of property rights in both land and patents.

First, the empirical studies in the patent literature that employ “property as trespass” rely on a doctrinal foil without any empirical verification. These studies typically restate the idealized theory of how the right to exclude functions within trespass doctrine, as it is formally conceptualized within the economic analysis of property law.² As a result, patent scholarship simply assumes that this classic “property rule” doctrine works clearly and efficiently.³ Although there appear to be no wide scale empirical studies of trespass doctrine, more delimited studies and anecdotal evidence suggest that the picture is more complicated than patent scholars assume.⁴

More important, an abstract conceptual ideal in one legal doctrine is not a commensurate standard for an empirical analysis about another legal doctrine.⁵ If the empirical studies of the patent system are to have any meaningful explanatory bite in the policy debates, then their claims have to answer the vital question: As compared to what? As of yet, the trespass standard remains

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¹ See, e.g., ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* 171 (2004) (“The primary objective of reform should be to reduce the uncertainty that now pervades many aspects of the patent system.”).

² See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (Papers & Proc.) 347, 356 (1967) (observing that “private ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his *power to exclude others*, . . . [has] incentives to utilize resources more efficiently”) (emphasis added).

³ See, e.g., JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 51 n.8 (2008) (asserting that “[w]e rarely hear about lawsuits caused because someone inadvertently built a structure on, or made some other investment within the boundaries of, another’s property” without any formal empirical studies to verify this claim).

⁴ Cf. Gary D. Libcap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Institutions* (NBER Working Paper No. w14942), available at <http://ssrn.com/abstract=1401787> (identifying differing economic effects between rectangular system and metes and bounds for demarcating boundaries of real property).

⁵ See BESSEN & MEURER, *supra* note 3, at 257 (“The problem with mistaking abstract conceptions of property for the real thing is that this substitutes rhetoric for reasoned policy.”).

empirically unverified. Of course, it is easy to solve this problem. To borrow James Bessen and Michael Meurer's mantra in their own trespass-based critique of the patent system: "The antidote is empirical evidence."⁶

Second, and even more important, there is a fundamental conceptual disconnect between the comparison of the patent system to trespass doctrine. Law students learn in their first-year property courses that an estate is not the same thing as land.⁷ In fact, it is a basic truism in property law that the physical boundaries of a parcel of land are not the same thing as the legal boundaries of an estate, which is measured in terms of duration.⁸ In sum, a fence does not define the boundaries of a fee simple. In comparing the patent system to trespass doctrine, patent scholars are comparing an entire legal entitlement to a single doctrine within another legal entitlement—an estate. As a matter of basic logic, patent scholars have been comparing a genus with a species. In so doing, patent scholars and lawyers have conceptually conflated land parcels with estates—equivocating between the subject matter of a legal right and the legal right itself.⁹

There is nothing wrong in comparing how different property rights function in the real world; this is often an important and enlightening inquiry. But logic demands that in using real property to evaluate the patent system one must compare apples to apples, not fruit to apples. Thus, if patent scholars are going to engage in such comparative analyses, then they should compare a patent to its counterpart in real property—an estate. As one federal court stated in the late nineteenth century, "patents are [an inventor's] title deeds."¹⁰ In fact, courts have long made this proper comparison between patents and the estates secured in title deeds.¹¹

A comparison between patents and real estate should thus reflect all of the rights that define the boundaries of an estate. This certainly includes trespass, but this single doctrine is not sufficient. Patent scholars should also include the basic property doctrines that secure the rights of use, enjoyment and disposal,¹² such as nuisance, adverse possession, easements, restrictive covenants, future interests, and defeasible fees, to name just a few. As the Colorado Supreme

⁶ *Id.*

⁷ See, e.g., *Eaton v. Boston C. & M. R.R.*, 51 N.H. 504, 511 (1872) ("In a strict legal sense, land is not 'property,' but the subject of property."); *Wynehamer v. People*, 13 N.Y. 378, 433 (1856) (Seldon, J.) ("Property is the right of any person to possess, use, enjoy and dispose of a thing. The term, although frequently applied to the thing itself, in strictness, means only the rights of the owner in relation to it.")

⁸ See SHELDON F. KURTZ, *MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY* (4th ed. 2005) ("The theory of estates, a peculiarity of Anglo-American law, is based on the concept of ownership measured in terms of time."); 1 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 10 (2d ed. 1898) ("Proprietary rights in land are . . . projected upon the plane of time. The category of quantity, of duration, is applied to them.")

⁹ See, e.g., BESSEN & MEURER, *supra* note 3, at 46 ("An ideal patent system features rights that are defined as clearly as the fence around a piece of land.")

¹⁰ *Birdsall v. McDonald*, 3 F. Cas. 441, 444 (C.C.N.D. Ohio 1874) (No. 1,434); see also Adam Mossoff, Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 994 n.194 (2007) (surveying numerous nineteenth-century cases in which patents are identified as "titles").

¹¹ See, e.g., *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6,742) (Woodbury, Circuit Justice) (instructing a jury in a patent infringement trial that "[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock").

¹² See *Wynehamer*, 13 N.Y. at 433 ("Property is the right of any person to possess, use, enjoy and dispose of a thing."); *McKeon v. Bisbee*, 9 Cal. 137, 142 (1858) ("Property is the exclusive right of possessing, enjoying, and disposing of a thing.")

Court aptly observed: “Property, in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, use, and alienate the same”¹³ If the comparisons of patents to real property are to make any sense as a conceptual matter, the doctrines that are necessary and sufficient in defining the boundaries of an estate should be included in the empirical and conceptual foils for evaluating the patent system writ large.

In fact, future interests—the right to create and convey more limited interests in one’s estate—are very similar to patents in both content and form. As a preliminary matter, disputes over future interests center on the scope of the estate, which defines the boundaries of the relevant legal rights and duties of the owners, such as the responsibilities imposed by waste doctrine in a life estate.¹⁴ Similarly, patent disputes typically center on the scope of the proper right secured by a patent. Moreover, as with patents, the legal rules that govern the creation and transfer of future interests have long been hyper-technical, formalistic, and, as lawyers are wont to point out, refer only to the legal interest that is being created in the conveyance instrument, not to the land as such.¹⁵ It is unsurprising that the term “incorporeal property” first arises in Anglo-American case law to refer to future interests.¹⁶ The doctrinal and factual similarities between future interests and patents are palpable, which perhaps explains why nineteenth-century courts looked to real property conveyance doctrines to define similar legal rules for conveyances of patent rights.¹⁷

An additional benefit in eliminating the “property as trespass” myth is that it explodes the improper use of the trespass metaphor in patent law. Of course, it is understandable why the “property as trespass” myth arose, as this conception of property reflects a symmetry between the exclusionary right in a patent and the similar exclusionary right in real property—both types of property regimes secure owners against infringement of their rights. But the framing of patent infringement as trespass is only a metaphor; ironically, while criticizing property metaphors in intellectual property doctrine, some patent scholars have been misled by this metaphor.¹⁸ In fact, early American courts used the trespass metaphor in infringement cases long before the patent

¹³ *City of Denver v. Bayer*, 2 P. 6, 6-7 (Colo. 1883).

¹⁴ *See Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899) (holding that a life tenant can make alterations to the land without liability to the remaindermen given a change in the conditions of the surrounding parcels and the maintenance of the value in the estate).

¹⁵ *See* DUKEMINIER ET AL., PROPERTY 182 (6th ed. 2006) (“The development of the fee simple estate is an example of that most striking phenomenon of English land law, the reification of abstractions, a process of thinking that still pervades our law. Instead of thinking of the land itself, the lawyer thinks of an *estate in land*, which is imagined as almost having a real existence apart from the land.”).

¹⁶ *See* F. POLLOCK & R.S. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 54 (Elibron Classics 2005) (1888) (“With regard to incorporeal hereditaments, such as a reversion, a remainder, an advowson, the established theory of our authorities is that, although one may have seisin of them by receiving the rent and services, or presenting a clerk to the church, they are not the subjects of livery of seisin; they lie in grant, that is, they can be alienated only by deed.”).

¹⁷ *See* Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J. L. & TECH. 321, 349-60 (forthcoming 2009), available at <http://ssrn.com/abstract=1239182> (discussing the use of real property concepts, doctrine and case law in nineteenth-century patent cases in which courts created the legal rules governing conveyances of patent rights).

¹⁸ *See, e.g.*, Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1071 (2005) (“My worry is that the rhetoric of property has a clear meaning in the minds of courts, lawyers, and commentators as ‘things that are owned by persons’ and that fixed meaning will make it all too tempting to fall into the trap of treating intellectual property as an absolute right to exclude.”).

system formally adopted peripheral claiming,¹⁹ which is one of the principal justifications today for the “property as trespass” myth.²⁰ The routine references to “trespass” in antebellum patent infringement cases—when patents only described the invention in a specification—underscores the extent to which this real property doctrine was originally understood to be only a metaphor for the protection of patents as property rights.

Lastly, the rejection of the “property as trespass” myth makes it possible to consider better conceptual and doctrinal foils in property law for evaluating the patent system today. One such possibility is that the better real property doctrine to compare to patent infringement is not trespass, but nuisance.²¹ Nuisance law maps onto patent infringement law in interesting and illuminating ways, both factually and doctrinally. First, as with patents, nuisance requires the identification of the somewhat nebulous boundaries of the estate (as defined not by physical fences but by exclusive use-rights). Second, as a doctrinal matter, nuisance is a standards-based regime that requires courts to engage in fact-intensive inquiries into the nature of the estates and the conflicting uses, which parallels the fact-intensive inquiries into the nature of the invention, field of art, and PHOSITA in determining the boundaries of a patent in an infringement lawsuit. Third, nuisance litigation often involves many different parties, and sometimes damage claims amounting to millions of dollars, just as patent infringement lawsuits do today. Fourth, there are interesting parallels between the remedies in nuisance and patent infringement cases, as both involve standards-based heuristics in determining whether to order injunctions, damages, or both.

In sum, the “property as trespass” myth in patent law has impoverished the patent policy debates, both empirically and conceptually. It has led to the use of an idealized abstraction about the right to exclude in real property to evaluate empirically whether the patent system is functioning properly or not. It has also led patent scholars to fail to see the conceptual and doctrinal connections between infringement doctrines in patent law and the doctrines in real property that secure the boundaries of the estate (as distinguished from the land as such). It is time for patent scholars to develop the proper empirical foil representing all of the real property doctrines that define the boundaries of an estate and to abandon the “property as trespass” myth altogether.

¹⁹ See Mossoff, *supra* note 10, at 993 (identifying early nineteenth-century case law in which patent infringers were accused of committing “trespass”).

²⁰ See, e.g., ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY* 26 (4th ed. 2007) (noting that “innumerable cases analogize claims to the ‘metes and bounds’ of a real property deed”); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 997 (Fed. Cir. 1995) (Mayer, J., concurring) (noting that “a patent may be thought of as a form of deed which sets out the metes and bounds of the property the inventor owns for the term and puts the world on notice to avoid trespass”).

²¹ See Christopher M. Newman, *Infringement as Nuisance* (George Mason Univ. L. & Econ. Res. Paper No. 09-17), available at <http://ssrn.com/abstract=1354110>.