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## THE INDETERMINACY CRITIQUE AND THE TRESPASS FALLACY

*Shine Tu*\*

One of the key functions of patents is to put the public on notice as to what they are allowed to use, sell, or manufacture without a patent-holder's consent.<sup>1</sup> Determining patent scope, however, is one of the most contentious and difficult tasks in modern patent law.<sup>2</sup> In fact, many argue that the patent system is broken because patents are too vague and indeterminate to function as property rights.<sup>3</sup> Many commentators note that patents lack the clear and stable boundaries provided by property law fences.<sup>4</sup> In *The Trespass Fallacy in Patent Law*, Professor Adam Mossoff takes on this idea and shows why property law cannot currently be used as an analogy for patent law principles.<sup>5</sup>

In his article, Mossoff offers a word of caution to those who would argue that the boundaries of patent claims are indeterminate when compared to the “clear” boundaries created by fences in property law. That word of caution is “the time is not ripe.” The time is not ripe because (1) commentators incorrectly compare the genus of patents to the species of trespass; and (2) there is no empirical evidence that supports the idea that property law boundaries are “clear.”<sup>6</sup> According to Mossoff, comparing patents to property has led to the formation of a normative standard that is flawed and ultimately based on a “trespass fallacy.”<sup>7</sup>

First, the comparison between trespass doctrine and patents fails because “appropriate conceptual symmetry” is lacking.<sup>8</sup> Mossoff acknowledges that the comparison is appealing “because it reflects

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1. John M. Golden, *Construing Patent Claims According to Their “Interpretive Community”*: A Call for an Attorney-Plus-Artisan Perspective, 21 HARV. J.L. & TECH. 321, 322 (2008).

2. *Id.*

3. See Gretchen Ann Bender, *Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for a Consistent Claim Construction Methodology*, 8 J. INTELL. PROP. L. 175, 209–11 (2001) (arguing the benefits of drafting a patent claim as vaguely and ambiguously as possible).

4. See, e.g., Tun-Jen Chiang, *Fixing Patent Boundaries*, 108 MICH. L. REV. 523, 523 (2010) (“This boundary function of [patent] claims is undermined by the fact that claims can be changed throughout the life of the patent, thereby moving the patent boundary. A boundary that can be moved at-will is one that the public cannot rely upon.”); Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1025–26 (2007) (noting that many observers claim, “instability and unpredictability in the law of claim interpretation have reached a point of crisis”).

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

6. *Id.* at 1692.

7. *Id.*

8. *Id.* at 1696–98.

symmetry between the exclusionary right in a patent and the exclusionary right in real estate.”<sup>9</sup> However, this comparison fails because it compares a genus (the entire legal rights associated with a patent) with a species (the narrow property doctrine of trespass).<sup>10</sup> Second, the analogy fails because scholars who use the patent-property analogy presume that estate boundaries are clear and determinate.<sup>11</sup> However, this assumption may or may not be true. Because no current formal studies verify that the boundaries of estates are clear and determinate, commentators who make the patent-property analogy may be standing on weak footing.

So when will the time be ripe for comparisons between patent boundaries and property boundaries? Mossoff gives us some hope by offering a two-step solution to the indeterminacy problem. The first step requires comparing patents to estates. Comparing the genus of legal rights associated with patents to the genus of legal rights associated with estates rectifies the “category mistake.” Comparing patents to estates, however, will require analysis along multiple dimensions, such as space, time, and use. The second, much larger, step requires an empirical analysis of property law along these dimensions. Mossoff suggests that the proper empirical study would capture doctrines such as trespass, adverse possession, easements, restrictive covenants, and nuisance.<sup>12</sup> Additionally, this empirical study would be based not only on case law, but also on non-judicial processes such as zoning, environmental regulations, and other statutes and regulations.<sup>13</sup> With these metrics, the study could legitimately compare property law doctrines with patent law doctrines.

Some commentators suggest that replacing the “rules of exclusion” with “rules of governance” makes for a better solution to the indeterminacy critique.<sup>14</sup> Accordingly, another solution may be to look beyond the property-patent comparison and rely on interpreting patents as a combination of rules and standards. Patents would then be compared not only to property law doctrines, but also to statutes, contracts, regulations, and other legal documents. Thus, there would be a shift from focusing on

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9. *Id.* at 1703

10. *See id.* at 1697–98 (“[T]o claim as identical the boundaries of legal title and trespass is tantamount to claiming that the broader concept of fruit is identical with an orange rind.”).

11. *Id.* at 1704–05.

12. *Id.* at 1707

13. *Id.* at 1708–10

14. Emily Michiko Morris, *Res or Rules? Patents and the (Uncertain) Rules of the Game*, 18 MICH. TELECOMM. & TECH. L. REV. 481, 536 (2012) (“[P]atents might better be described as rules of governance that define the contours of desirable and undesirable behavior instead of the metes and bounds of a property *res*.”); *see also id.* at 494 (“[P]atentable ideas are not just intangible but also conceptual in a way that necessarily focuses on utility and function. . . . patentable ideas are, per design, always novel and unique in a way that defies easy description through standardization or prototypization. . . . [thus] [a]ny comparison between real property and patentable property must therefore necessarily falter.”).

the exclusionary rights associated with patents and property to a focus on permitted and prohibited uses of an asset.<sup>15</sup> Use of a hybrid system based on both rules and standards would have interesting practical implications. In practice, parties would still interpret claims, but courts could also rely more heavily on the doctrine of equivalents and give greater strength to means-plus function formats under 35 U.S.C. §112(f) 6.<sup>16</sup> This hybrid would balance the public notice function of patents with the equitable concerns that hinder the inherent clarity of notice found in emerging technologies that may or may not be present with real property.

In contrast to Mossoff, some commentators argue that the time for property-patent comparisons will never be ripe, and that the intrinsic differences between patents and property make the analogy insoluble.<sup>17</sup> For example, Professor Menell argues that philosophical, functional, and political differences make the property framework unsuitable for intellectual property.<sup>18</sup> Thus, another possible solution would be to jettison the property-patent analogy altogether. Commentators such as Professors Burk and Lemley argue that the meaning of claims may be “inherently indeterminate,”<sup>19</sup> and suggest the solution may be to move from peripheral claiming to central claiming.<sup>20</sup>

In sum, Mossoff brings to light an interesting caveat to why we should be wary of comparing patent law to property law. Mossoff’s solution, however, will require some extremely challenging empirical data collection. In the end, perhaps, the better solution would be to do away with the pure comparison between patents and estates and to move to a hybrid system based on rules and standards, or do away with the comparison altogether.

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15. For additional information on the different applications of exclusionary rules and governance rules, see Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 724–30 (2009).

16. 35 U.S.C. §112(f) 2012.

17. Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. PA. L. REV. 1743, 1745 (2009) (“[C]laim construction may be inherently indeterminate: it may be impossible to cleanly map words to things.”).

18. Peter S. Menell, *The Property Rights Movement’s Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 741–51 (2007).

19. Burk & Lemley, *supra* note 17, at 1745; *id.* at 1760 (“In the industries that account for the overwhelming majority of patents, figuring out the boundaries of a peripheral claim is difficult, if not impossible.”).

20. See *id.* at 1794 (“Central claiming avoids the [indeterminacy] problem, not by offering greater determinacy, but by avoiding the pretense that such determinacy is possible.”).