DANGEROUS INTELLECTUAL PROPERTY

IP ACCIDENTS: NEGLIGENCE LIABILITY IN INTELLECTUAL PROPERTY, by Patrick R. Goold. Cambridge University Press, 2022. xvi + 134 pp. Hardcover $110.00.

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Whatever you think of the term "Intellectual Property," it is a fantastic example of academic branding. The term is meant to describe a property right in intangible creations of the human mind, but it also suggests that IP law is a particularly cerebral pursuit. Of course, all legal subject areas—from criminal law to securities regulation—can warrant theoretical sophistication and detailed analysis, but it is only those of us who study copyrights, patents, and trademarks who get to call their field "Intellectual." Patrick Goold would throw a new word with a very different valence— "accidents"—into the mix. In a provocative and well-written book (and also of very manageable size), Goold proposes revolutionizing the way in which copyright and patent infringement has been determined for more than a century, trading out the current strict liability regime for one in which the plaintiff's and the defendant's behavior is tested for negligence.

Goold gets there by describing a world where creativity can be good but also "risky" (p.3). Drawing a parallel to the dangerous new technologies of the late nineteenth century (think locomotives and automobiles), Goold submits that copyrights have a similar potential for wreaking havoc in the lives of creators and users of intellectual goods. "While the Industrial Revolution created new opportunities for accidental personal injuries, the Information Age has heightened the risk of accidental property injury" (p.50). How so? Goold points to a list of trends contributing to IP accidents that will be familiar to most, including expanding definitions of copyrightable subject matter, the absence or deterioration of notice requirements, and an exponential increase in the number of copyrighted works. (Goold notes similar phenomena also operating in patent law.) The result is that users "are not in possession of the facts to determine whether [a creative work] is protected by an IP right or not" (p.16). With no realistic mechanism for making sure that they can proceed without committing an act of infringement, they unwittingly infringe, damaging the authors of creative works.

The solution to this dangerous world is the law of negligence. Under the current strict liability paradigm, it doesn't matter why someone infringed or whether they

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took precautions to try to avoid infringement—so long as infringement occurred, they will be liable. Goold contends that this is a mistake, that creativity inherently involves risk (especially in the modern era of proliferating IP and insufficient notice), and that "accidental" infringers should not necessarily be the ones to bear all that risk. Instead of being liable for any infringing act, users should have acted with "reasonable care," doing things like "searching for any IP owners, checking various patent and copyright registers,
and inspecting any physical goods for IP information" (p.5). Then, "if the user has adopted all reasonable precautionary measures at their disposal, the case ought to be dismissed" (p.99).

Although Goold wants a simple rather than contributory negligence standard, the key to his proposal is that the behavior of *both* accused infringers and IP owners will scrutinized to determine whether they took reasonable steps to avoid infringement in the first place. For their part, reasonable IP owners need to provide adequate notice on their creative goods, make use of existing registration systems and other mechanisms for documenting their rights, and respond when a user gives them an easy and well-publicized method for opting out of a planned use (pp.53-54). Otherwise, a user's predicted harm from its actions will be small enough that the user should be deemed have satisfied the reasonable care standard and avoid liability.

It is a bold idea to junk the basic, well over a century-old test for liability in intellectual property law, but Goold backs up his idea with telling examples and thoughtful analysis. Most of his argument is consequentialist. By absolving users who take reasonable care not to infringe, a negligence regime promotes more notice and clearer claims from IP owners (and more due diligence from users). This much seems fairly certain. But Goold also investigates more nuanced liability standards, explaining why a simple negligence rule is superior to contributory or comparative negligence regimes in terms of both administrative burdens and in managing the costs of error from the inevitable, sometimes erroneous application of different liability rules (pp.62-74).

What I liked even better than Goold's account of negligence's utilitarian benefits was his interrogation of its non-consequentialist justifications. He argues that replacing strict liability with negligence will not only lead to efficiency gains but also makes deontological sense for users who try but fail to avoid infringement. How should we assess "blame" for IP accidents? Goold has no patience for the Old Testament "Thou Shalt No Steal" reasoning that is sometimes used to justify a strict liability approach to infringement.[1] He quickly dispatches arguments that an infringer's actions are always blameworthy because they involve someone else's "property" or because infringement is an act caused solely by the infringer. Trickier is application of George Fletcher's fairness-based justification for tort liability. Fletcher maintains that "when an accident materializes out of non-reciprocal risk, fairness requires the risktaker to
be held responsible for the accident" (p.90). The manufacturer of a product

[1] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 n.12 (6th Cir. 2005).

should be responsible for consumer injuries because the manufacturer exposes the consumer to risk whereas the consumer does not expose the manufacturer to risk. A defender of the status quo might argue that, like product manufacturers, accidentally infringing users are imposing non-reciprocal risks on IP owners. A decision to push ahead and use out-of-print materials or develop a rival technology that subjects rightsholders to financial loss exposes one side to risk in the same lopsided way, which means, according to Fletcher's formula, users, not owners, should bear all the legal responsibility.

Goold's answer is that "it is far more likely that creativity is an activity that involves significant levels of reciprocal risk" (p.91). Given the potential for subconscious copying, he posits, anyone who writes a song imposes the risk of accidental infringement on future songwriters. Similarly, anyone who patents a complicated technology makes it more risky for developers of subsequent technologies who must navigate a world of patent thickets and imprecise patent claiming. It's an interesting argument and one that should resonate not just with songwriters and inventors but all of us as we constantly hazard unwittingly infringing the creative output of others with our digital cameras, social media posts, and forwarded emails.

One item in Goold's account I'm skeptical of is the explanation for why tort law managed to see the light and adopt a negligence regime so long ago while IP has remained stuck in its strict liability ways. Goold contends that although attempts were made in the past to absolve infringers who were unaware of a copyright or patent and infringed, "no lawyers thought to make the alternative, and far more persuasive, argument that a user who has adopted the care of a reasonable person ought to avoid liability" (p.108). It seems unlikely to me that no one tried to make the case that taking precautionary measures akin to those taken in the vast and familiar field of tort law should exonerate someone from infringement liability. IP litigation is as much about compelling analogies and winning judicial sympathies as it is following extant legal rules so it would have been natural to point to consultations with attorneys, searches in government registries, and attempts to solicit permission from authors and inventors as justification for absolving an infringement defendant of responsibility.

The more likely explanation for the difference between tort and IP liability is that judges consciously elected to encourage precautionary measures and soften the blow of IP infringement verdicts through evaluation of defenses and awards of relief rather than through the definition of infringement itself. As Goold acknowledges, though sometimes late in his argument, IP law is chock full of doctrines that privilege infringers who meant to do the right thing. In copyright, statutory damages are ratcheted up when infringement is "willful" and reduced when it is "innocent," the fair use analysis examines an infringer's motivations under its purpose and character factor, and de minimis copying of copyrighted material, which often occurs "accidentally," is exempted from

infringement liability.[2] For its part, patent law refuses to award damages when the inventor fails to provide required notice of patent rights and the accused infringer remained unaware of the patent.[3] In both regimes, liability against secondary infringers is only available with proof of a culpable mental state and equitable doctrines like estoppel have been invoked to take into account the "fault" of the rights holder. These mechanisms for removing or at least softening the blow of liability for accidental infringers makes me think that intellectual property liability looks the way it does because of calculated choices rather than judicial blind spots or inept advocacy.

But how we got here is not as important as whether replacing strict liability with negligence is the right solution. On this, I'm still just not sure, though Goold has given me a lot more to think about. There is no doubt that the current regime does not do as much as it could to encourage precautionary measures. I'm sympathetic to the description here of a world where individuals and businesses forced to navigate patent thickets and creative works bearing no notice sometimes just have to close their eyes and hope for the best. But I also wonder whether a rule that "judges ought to impose liability when a user fails to take any precautionary measure (e.g., a search, a call for information) where the marginal cost of precaution of said precaution is lower than the marginal reduction in expected accident costs" will translate into real guidance for those seeking to avoid accidentally infringing (p.106). Some scholarship already casts doubt on the utility of such cost-benefit analyses for legal decisionmaking.[4] After reading the book, I'm unclear as to what a "reasonable search" might entail besides scanning existing registries (which a savvy user should already be doing) and running things by counsel. A negligence standard might be a recipe for greater IP attorney employment (hooray!), but perhaps so indeterminate as to not succeed in more efficiently reallocating risk from users to owners as Goold desires.

IP ACCIDENTS aligns itself with those who champion common law decisionmaking as a beneficial force for the development of intellectual property law.[5] Despite the previous paragraph, I'm sympathetic with this approach and agree with Goold's point that developing standards for reasonable care requires attention to context and case-specific reasoning. At the same time, one wonders if more targeted interventions might be better suited to deal with a world plagued by IP accidents than getting rid of strict liability. If it is too hard today to

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[2] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016); Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625 (S.D.N.Y. 2008).

[3] 35 U.S.C. § 287.

[4] John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015); Matthew G. Sipe, *Patent Law's Philosophical Fault Line*, 2019 WIS. L. REV. 1033, 1094. *See also* Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 558 n.116 (2017) (citing studies showing that courts rarely apply and litigants rarely raise the Hand formula).

[5] *See, e.g.*, Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

understand whether something is protected by an IP right or not, why not demand the use of notice for copyrighted works[6] or bolster disclosure requirements[7] instead of upending the entire test for infringement? Goold offers some reasons for why he is unwilling to accept narrower legal interventions (pp. 94-97, 103-105), but his intriguing thesis made me want to know more about how he weighs the tradeoffs between particularized statutory interventions and general common law adjudication.

I venture these thoughts about history and how to evaluate the costs of injecting greater uncertainty into the infringement analysis not because I think they are fatal to Goold's thesis. Even if some, after reading this book, might remain unsure if negligence is the best way forward for dealing with the problem of IP accidents, every reader will benefit from the book's efforts to readjust our view of creativity and its consequences. As I've written in other contexts, too often courts have been guilty of describing creativity as an unmitigated social good.[8] Failure in copyright law to articulate any meaningful definition for when a work is sufficiently creative to warrant protection burdens future artists and inventors by inflating the number and scope of IP rights they must design around. It is by no means certain that any minimally creative work deserves a temporary legal monopoly or that the answer to what is the optimal amount of creativity in society should always be "more and more." As Goold says, "[c]reativity comes with benefits, but also produces risk of accidents" (p.67). By prompting a more balanced view, Goold's brainy book provides an important service to all of us who study IP.

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[6] Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).
[7] Jeanne C. Fromer, *Patent Disclosure*, 94 IOWA L. REV. 539 (2009).
[8] Mark Bartholomew, *Copyright and the Creative Process*, 97 NOTRE DAME L. REV. 357 (2021). This is a problem for patent law as well. *See* Mark Bartholomew, *Nonobvious Design*, 108 IOWA L. REV. 601 (2023).