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The “Strict Liability” of Direct Patent Infringement

*Lynda J. Oswald**

ABSTRACT

In 1995, the Federal Circuit summarily attached the label of “strict liability” to direct patent infringement, even though that term does not appear in any US Patent Act enacted in the past two centuries. The catechism of “strict” direct patent infringement liability is now so well engrained in patent doctrine that it is easy to lose sight of how recent the advent of this terminology is in the case law, and how troublesome application of this standard has proven, even to the Federal Circuit, which created it. The first Patent Act (1790) preceded the emergence of tort law as a distinct field of US common law (mid-1800s) by a half-century or more, and the products liability explosion of the mid-twentieth century radically altered our understanding of strict liability. The implications of this forgotten timeline are profound. “Strict liability,” particularly in its modern formulation, is not a neutral, descriptive term. Rather, the term evokes social policy choices and balancing considerations that may be appropriate within the case law context of products liability or abnormally dangerous activities, but which are incongruous and inapposite in the statutory context of patent law. Deeming direct patent infringement to be “strict liability” leads to two unanticipated and unwelcome effects. First, the adoption of the “strict liability” label for direct patent infringement liability improperly inflates the courts’ role in setting direct patent infringement liability standards and suggests—incorrectly—that patent liability is a case law construct, when in fact it is a statutory construct. Second, the

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“strict liability” label improperly shifts the focus of the patent infringement inquiry from the Patent Act’s protection of the plaintiff’s exclusive property interest in its patent right toward a value-laden examination of the social utility of the defendant’s conduct vis-à-vis the injury to the patent holder. Jettisoning the “strict liability” label for direct patent infringement would reframe the analysis and debate, moving direct patent infringement liability out of a policy framework and back toward its proper statutory setting.

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I. INTRODUCTION

Is direct patent infringement liability a “strict liability” standard? The reflexive answer to that question for the past two decades has been “yes.” In 1995, the Federal Circuit, with no elaboration or explanation, attached the label of “strict liability” to direct patent infringement,¹ and lower federal courts² and

1. Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1527 (Fed. Cir. 1995) (*en banc*), *rev’d on other grounds*, 520 U.S. 17 (1997).

2. See, e.g., Potter Voice Techs., LLC v. Apple Inc., 24 F. Supp. 3d 882, 885 (N.D. Cal. 2014) (“Because patent infringement is a strict liability offense, the nature of the offense is relevant only in determining whether enhanced damages are warranted.” (quoting *In re Seagate Tech.*, LLC, 497 F.3d 1360, 1368 (Fed. Cir. 2007))); Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., CV 95-4995 LGB (JGx), 1998 U.S. Dist. LEXIS 17288, at *26 (C.D. Cal. Sept. 3, 1998) (“[P]atent infringement is a strict liability offense[.]” (citing *Jurgen v. CBK, Ltd.*, 80 F.3d

commentators³ followed suit without comment or inquiry. Today, the catechism of “strict” direct patent infringement liability is so well engrained in patent doctrine and case law that it is easy to lose sight of how recent the appearance of the strict liability terminology is in patent case law and how troublesome the strict liability standard is in that context to the courts that must now employ it—including, ironically, the Federal Circuit itself.⁴

The Patent Act⁵ does not define direct patent infringement as “strict liability.” Rather, the statutory language eschews labels and simply sets forth liability unconstrained by fault, intent, or knowledge elements as the measure for such infringement: “[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States, or imports into the United States any patented invention during the term of the patent therefore, infringes the patent.”⁶

The adoption of the appellation “strict liability” for direct patent infringement was not a mere inconsequential exercise in semantics. Because of its close connection with the emergence of

1566, 1570 n.2 (Fed. Cir. 1996) and *Warner-Jenkinson*, 62 F.3d at 1527)); On Demand Mach. Corp. v. Ingram Indus., No. 4:01CV1668MLM, 2004 U.S. Dist. LEXIS 29622, at *2 (E.D. Mo. July 23, 2004) (“Infringement is a strict liability offense and the court must award compensatory damages regardless of the intent, culpability or motivation of the infringer.”); Lee v. Accessories by Peak, 705 F. Supp. 2d 249, 254 (W.D.N.Y. 2010) (“Because patent infringement is ‘a strict liability offense,’ the courts have found that intent is not an element of a direct infringement claim, and neither ignorance of the patent nor good faith belief in non-infringement is a defense to a charge of infringement under section 271(a).” (citing *Seagate*, 497 F.3d at 1368 and *Warner-Jenkinson*, 62 F.3d at 1527)); Tierra Intellectual Borinquen, Inc. v. ASUS Comput. Int’l, Inc., No. 2:13-CV-38-JRG, 2014 U.S. Dist. LEXIS 28249, at *9 (E.D. Tex. Mar. 3, 2014) (“Direct patent infringement is a strict liability cause of action and requires neither knowledge nor specific intent on the part of an infringing defendant.”).

3. See, e.g., Timothy R. Holbrook, *The Potential Extraterritoriality Consequences of Akamai*, 26 EMORY INT'L L. REV. 499, 502 (2012); Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 OHIO ST. L.J. 467, 558 (2015); Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1525 (2007); Matthew D. Powers & Steven C. Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 SYRACUSE L. REV. 53, 56 (2001); Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575, 1590 (2011); Christopher B. Seaman, *Willful Patent Infringement and Enhanced Damages After *In re Seagate*: An Empirical Study*, 97 IOWA L. REV. 417, 421 (2012). This Author has also fallen prey to this practice in the past. See, e.g., Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights*, 45 AM. BUS. L.J. 247, 256 (2008).

4. See *infra* notes 122–72 and accompanying text (discussing Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012) (*en banc*) (per curiam) (depublished), *rev’d & remanded*, 134 S. Ct. 2111 (2014), *on remand*, 786 F.3d 899 (2015), *rev’d*, 797 F.3d 1020 (2015) (*en banc*) (per curiam)).

5. Patent Act of 1952, as amended, 35 U.S.C. § 271(a) (2012).

6. *Id.* Earlier patent acts reached a similar result, albeit with slightly different language. See *infra* note 45 and accompanying text.

products liability law in the 1960s and early 1970s,⁷ modern strict liability carries a lot of baggage that colors the manner in which courts and commentators view the causes of action to which it is attached. The shortcomings of using this value-laden term for direct patent infringement liability were made readily apparent in the Federal Circuit's 2012 *en banc* decision on multi-actor infringement in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*⁸ ("2012 *Akamai en banc*"). The *en banc* majority's effort to avoid what it felt was an overly harsh standard of strict liability resulted in the adoption of a liability rule for multi-actor patent infringement that was contrary to both statute and precedent and that was quickly overturned by the Supreme Court.⁹

Why did the Federal Circuit attach the "strict liability" label to direct patent infringement liability in 1995 and what are the consequences of adopting this inapt terminology? The answers to these questions lie in the ramifications of a forgotten timeline of doctrinal development of patent law vis-à-vis tort law. The mantra of modern patent law routinely recites that infringement of a patent is a tort¹⁰ and that patent infringers are tortfeasors.¹¹ Those classifications fit neatly into the framework of our modern legal system in which tort doctrine is recognized as a foundational area of common law. They also lead to the glib and ill-advised application of tort liability vocabulary—e.g., "strict liability"—to patent infringement inquiries, which in turn has led to incorrect patent doctrine.

To understand where the Federal Circuit went astray in 1995, one must understand the historical development and doctrinal

7. See discussion on the development of strict products liability *infra* Part II.B.1.

8. 692 F.3d 1301 (Fed. Cir. 2012) (*en banc*) (per curiam) (depublished), *rev'd & remanded*, 134 S. Ct. 2111 (2014), *on remand*, 786 F.3d 899 (2015), *rev'd*, 797 F.3d 1020 (2015) (*en banc*) (per curiam).

9. See *infra* notes 125–72 and accompanying text (discussing *Akamai*).

10. Carbice Corp. of Am. v. Am. Patents Dev. Corp., 283 U.S. 27, 33 (1931); *Akamai v. Limelight Networks Inc.*, 786 F.3d 899, 905 (Fed. Cir. 2015), *rev'd on other grounds*, 797 F.3d 1020 (Fed. Cir. 2015) (*en banc*) (per curiam); *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1365 (Fed. Cir. 2008); *Orthokinetics Inc. v. Safety Travel Chairs Inc.*, 806 F.2d 1565, 1579 (Fed. Cir. 1986); H. Hume Mathews, *Contributory Infringement and the Mercoind Cases*, 27 J. PAT. OFF. SOC'Y 260, 262 (1945) (referencing cases cited at 62 CORPUS JURIS. 1088) ("These statutes expressly grant a 'right'; as it is a civil right an invasion thereof is a tort."); Odin B. Roberts, *Contributory Infringement of Patent Rights*, 12 HARV. L. REV. 35, 37 (1888); Michael L. Rustad, *Symposium: Does the World Still Need United States Tort Law? Or Did It Ever?*, 38 PEPP. L. REV. 433, 514 (2011).

11. See *Dowagiac Mfg. Co. v. Minn. Moline Plow Co.*, 235 U.S. 641, 648 (1915). Infringement is viewed as a trespass upon the rights granted by the patent. See Samuel Ewer Eastman, *Contributory Infringement and the Combination Patent*, 48 MICH. L. REV. 183, 184 (1949); Rustad, *supra* note 10, at 514.

foundations of patent infringement liability and tort doctrine, particularly strict liability. Oddly enough, this is not a topic that has garnered the attention of courts or commentators to date, yet this historical landscape continues to influence the parameters of modern patent infringement liability doctrine.

This Article begins by examining the historical development of patent and tort doctrine in US law. Tort law in general, and strict liability in particular, is a relative latecomer to US law as compared to the Patent Acts. Part II.A explores the property law foundations of US patent law and the early development of patent infringement standards, beginning with the very first patent statute, the Patent Act of 1790, and the early case law. Part II.B reveals that US tort law in general, and strict liability doctrine in particular, followed separate paths and timelines of development. It was only in 1995 that direct patent infringement and strict liability converged in Federal Circuit case law. As Part III illustrates, this misalliance peaked in the 2012 *Akamai en banc* decision,¹² leading to the Federal Circuit's failed attempt to rewrite patent law in an effort to avoid the harsh effects of applying modern strict liability doctrine to direct patent infringement.

The ultimate question, of course, is why it matters if courts and commentators have mislabeled direct patent infringement as a "strict liability" offense. Part IV explores this issue, finding that the use of the strict liability label has two deleterious consequences for patent doctrine. First, the adoption of the strict liability label for direct patent infringement liability improperly inflates the courts' role in setting direct patent infringement standards, incorrectly intimating that patent infringement liability is a case law construct, rather than a statutory construct. Second, the strict liability label subtly but insidiously implies that, rather than focusing solely upon the broad protection of the patentee's property right mandated by the statutory language of the Patent Act, the court may consider social policy concerns, such as over-expansive imposition of liability, as mitigating factors in evaluating a defendant's liability.¹³ This reframing in effect rewrites statutory patent infringement liability language that has remained unchanged in substance, if not form, for over two centuries, leading again to doctrinal erosion and disregard of the respective roles of courts and Congress in setting patent infringement standards.

12. *Akamai*, 786 F.3d at 905.

13. This is clearly illustrated by the majority opinion in the 2012 *Akamai en banc* decision. See *infra* notes 131–40 and accompanying text.

II. THE HISTORICAL ROOTS OF PATENT AND TORT DOCTRINE IN US LAW

Put succinctly, tort law is an anachronistic concept in the context of statutory patent law. As Figure 1 below illustrates, the first US Patent Act was enacted in 1790.¹⁴ Tort law did not emerge as a foundational field of US law until the mid-1800s. Thus, the earliest US patent statutes predate the emergence of tort law as a distinct field of US law by a half-century or so. The drafters of the early patent acts would not have thought of patent infringement in tort liability terms for the simple reason that tort law did not exist as a separate branch of American law at the time those drafters were working out the original statutory parameters of patent law. Moreover, the products liability law explosion of the mid-twentieth century altered forever our view of strict liability, generating extensive scholarly and judicial commentary on the social policy choices and legal theories underlying this standard of liability. By the time the Federal Circuit adopted the term “strict liability” to describe direct patent infringement liability in 1995, the term had already acquired connotations that were as firmly fixed in the legal lexicon as they were inapt in the patent law context.

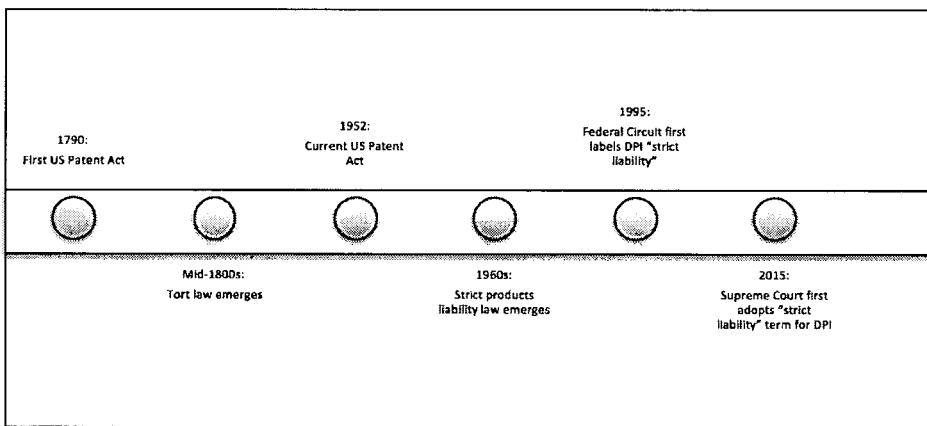


FIGURE 1: TIMELINE OF DOCTRINAL DEVELOPMENTS¹⁵

This timeline of doctrinal developments seems to have been forgotten in modern patent law, and the consequences of that doctrinal elision are profound. Had the Federal Circuit fully considered the ramifications of the relatively late appearance of tort law as compared to patent statutes in US legal doctrine, it might have

14. Act of Apr. 10, 1790, 1 Stat. 109. The 1790 Act was quickly replaced by the Patent Act of 1793. Act of Feb. 21, 1793, 1 Stat. 318.

15. “DPI” stands for “direct patent infringement.”

been more reticent in 1995 in adopting the simplistic shorthand of “strict liability” to describe direct patent infringement—and patent infringement liability doctrine would rest on sounder theoretical ground today.

A. The Development of Direct Patent Infringement Liability

Modern scholars vigorously debate whether patents are properly regarded as “property.”¹⁶ However, modern case law¹⁷ and the current Patent Act¹⁸ do not evidence similar uncertainty: in the eyes of the courts and the legislature, patents are property.

More importantly, drafters of the first US patent acts and early courts, working largely within the framework they inherited from British systems,¹⁹ clearly viewed patent law as a form of property law²⁰ and protected patents accordingly. A rigorous exploration of the historical relationship between patents and property led Mossoff to conclude that “early American court opinions, legislative debates and treatises reveal that patents were defined and secured in the law as fundamental civil rights securing property rights.”²¹ As he explained:

There was widespread agreement among judges and lawyers, for instance, that common law property concepts and doctrines applied to patents. Early American courts defined patents as “title deeds,” identified multiple co-owners of patents as “tenants in common,” and expressly incorporated common law property doctrines into patent law, such as securing to patent-owners the same conveyance rights already secured to property owners in “assignments” and “licenses.” In adjudicating patent disputes, early courts cited to and relied on common law property cases as a determinative precedent. They also adopted property rhetoric in patent cases, referring to infringers as “pirates” and regularly instructing juries in patent infringement trials that “[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock.”²²

16. See Adam Mossoff, *INTRODUCTION TO INTELLECTUAL PROPERTY AND PROPERTY RIGHTS*, at ix (Adam Mossoff ed., 2013) (summarizing literature).

17. See, e.g., *Fla. Prepaid Postsecondary Educ. Expenses Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999) (“Patents . . . have long been considered a species of property.”).

18. See, e.g., 35 U.S.C. § 261 (2012) (“[P]atents shall have the attributes of personal property.”).

19. EDWARD C. WALTERSCHEID, *TO PROMOTE THE PROGRESS OF USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION, 1798–1836*, at 3 (1998).

20. See, e.g., WILLIAM P. KOOKOGEY, *PATENT LAW IN BRIEF* 11 (1884) (“Patents in this country are not subject to the will of any ruler, but are recognized as property of the highest character.”).

21. Mossoff, *supra* note 16, at xi.

22. *Id.* (footnotes omitted).

In short, Mossoff found, early courts “relied on and employed concepts, doctrines, and rhetoric from real property in crafting the doctrines that now comprise the American patent system,”²³ viewing patent infringement as “an unlawful invasion of property”²⁴ and thus akin to a “trespass” to land.²⁵

Trespass, and the role of writs as the basis for trespass actions, played a key role in early understandings of patent infringement liability.²⁶ The early US legal system was based upon the English common law; early English common law in turn grounded remedies for wrongs in the issuance of writs used to bring the defendant before the court. As Prosser and Keeton noted in their leading tort treatise, the system was rigid: “The number of such writs available was very limited, and their forms were strictly prescribed; and unless the cause of action could be fitted into the form of some recognized writ, the plaintiff was without a remedy.”²⁷ Although the rigidity of “this highly formal and artificial system of procedure” eased over time,²⁸ the writ system itself persisted, leading Prosser to conclude that “[a]t the beginning of the nineteenth century [writs] still existed, although somewhat blurred in their outlines, as the core of common law procedure.”²⁹

The two writs available for remedies for what today would be seen as purely tortious behavior were the actions of *trespass* (for “all forcible, direct and immediate injuries, whether to person or to property”)³⁰ and *trespass on the case* (intended to address wrongful conduct that resulted in injuries that “were not forcible or not

23. Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1692 (2013) (footnote omitted).

24. Gray v. James, 10 F. Cas. 1019, 1021 (C.C.D. Pa. 1817) (cited in Mossoff, *supra* note 16, at xi).

25. See, e.g., United States v. Palmer, 128 U.S. 262, 269 (1888) (analogizing patent infringement to an intentional and continued trespass on land). See generally Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 993 n.192 (2007) (listing cases). Early commentators also employed this term. See, e.g., Roberts, *supra* note 10, at 40; Chauncey Smith, *Amendment of the Patent Law*, 12 AM. L. REV. 205, 213 (1878); James J. Storrow, *Money Recoveries in Patent Suits*, 13 AM. L. REV. 1, 1 (1878).

26. A concise history of trespass can be found in Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

27. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 6, at 29 (5th ed. 1984) [hereinafter PROSSER & KEETON].

28. *Id.*

29. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 19 (1941); see also G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 8 (2003) (footnote omitted) (noting that until the mid-1800s, tort law was “a collection of unrelated writs”).

30. PROSSER & KEETON, *supra* note 27, § 6, at 29.

direct").³¹ Trespass emerged in the thirteenth century and "had a basic criminal character," arising out of breaches of the peace.³² Trespass on the case was a later development, first appearing in printed cases in the fourteenth century.³³

While trespass on the case requires wrongful intent or negligence,³⁴ trespass itself was originally conceived of as a liability without fault or intent.³⁵ Where interference with exclusive possession occurred, regardless of the defendant's culpability, liability ensued, even in the absence of actual harm to the plaintiff.³⁶ Although that standard may seem odd to our modern sensibilities, as Peck explained, it was not viewed as harsh in a pre-industrialized, pre-mechanized society, as it "did not have a disruptive effect upon society, and did not deter or misdirect otherwise desirable economic activity."³⁷

Federal authority to regulate patents arose from the Intellectual Property Clause of the US Constitution, which gave Congress the power to grant "for limited times . . . to inventors the exclusive right to their . . . discoveries."³⁸ Congress enacted the first Patent Act in

31. *Id.* Prosser and Keeton illustrate the difference using the "classic" example of a log thrown into a roadway. A person injured by the log as it fell would have an action in trespass against the thrower, while a person who incurred an injury from tripping over the log would have an action on the case. *Id.* (footnote omitted); see also FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 1.3, at 7 (3d ed. 2015) (noting that "from this writ [of trespass] most of the law of torts has grown").

32. PROSSER & KEETON, *supra* note 27, § 6, at 29.

33. See Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142, 1164 (1937).

34. PROSSER & KEETON, *supra* note 27, § 6, at 30.

35. *Id.*; see also FRANCIS M. BURDICK, THE LAW OF TORTS ch. XI, at 338 (1905) (footnotes omitted) (citing, *inter alia*, Guille v. Swan, 19 Johns. 381 (N.Y. 1822); Higginson v. York, 5 Mass. 341 (1809)) ("innocence and good faith will not protect" the trespasser); HARPER, JAMES & GRAY, *supra* note 31, § 1.3, at 8 ("The test for trespass came to be whether a defendant's voluntary conduct directly invaded the plaintiff's person or property, and this test was applied to inadvertent or accidental invasions as well as intentional ones."); Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 464–65 (1959) ("Historically, the requirements for common law trespass were that the invasion was a direct result of the defendant's act and interfered with plaintiff's interest in the exclusion possession of his land. There was no requirement of either fault or harm."). There were some excuses to liability, such as self-defense or effecting a lawful arrest. See HARPER, JAMES & GRAY, *supra* note 31, § 12.2, at 131–32.

36. PROSSER & KEETON, *supra* note 27, § 6, at 30.

37. Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 229 (1971).

38. U.S. CONST. art. I, § 8, cl. 8. Prior to then, the colonies had issued patents, and remnants of state patent law persisted into the early 1800s. See EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 777 (2002).

1790,³⁹ followed in quick succession by the Acts of 1793,⁴⁰ 1800,⁴¹ and 1836,⁴² and culminating in the current act, the Patent Act of 1952.⁴³

Patents initially were viewed as “writ[s] granting an exclusive privilege,”⁴⁴ in keeping with the common law’s requirement that remedies flow from writs. In addition, from the beginning, the patent acts grounded direct patent infringement liability in intrusion into the exclusive rights of the patentee, and provided no grounds on which such intrusion would be excused. For example, the Patent Act of 1790 provided:

[I]f any person or persons shall devise, make, construct, use, employ, or vend within these United States . . . any Invention . . . the sole and exclusive right of which shall be so as aforesaid granted by Patent to any person or persons, . . . without the Consent of the Patentee or Patentees, . . . *every person so offending* shall forfeit and pay to the said Patentee or Patentees . . . such damages as shall be assessed by a jury . . .⁴⁵

No provision was made for excusing the defendant’s liability for lack of intent or knowledge. Certainly, early drafters knew how to provide for an explicit fault or intent standard when they wanted such. When the Patent Act of 1793 was being debated, for example, a bill, H.R. 121, would have provided for several affirmative defenses, including a provision that those who infringed a patent without knowledge of it would not be held liable, “[a]nd any person making or selling the thing so invented as aforesaid shall be liable to an action at law . . . unless he can shew on like grounds that he did not know that there existed an exclusive right to the said invention . . .”⁴⁶ The bill was not enacted, and this proposed affirmative defense faded from history. Subsequently, Section 15 of the 1836 Act set forth a number of defenses that the alleged infringer could raise, but lack of knowledge or intent was not among those listed.⁴⁷

Court decisions from the nineteenth and early twentieth centuries analyzed patent infringement in terms of liability without

39. 1 Stat. 109.

40. 1 Stat. 318.

41. 2 Stat. 37.

42. 5 Stat. 117.

43. Patent Act of 1952, as amended, 35 U.S.C. §§ 1–376 (2012).

44. WILLARD PHILLIPS, THE LAW OF PATENTS FOR INVENTIONS 2 (1837) (emphasis omitted).

45. Patent Act of 1790, § 4, 1 Stat. 109 (emphasis added). The Patent Act of 1793, § 5, 1 Stat. 318, and the Patent Act of 1800, § 3, 2 Stat. 37, had similar language.

46. H.R. 121, 1st Cong. ¶ 2 (1791) (emphasis added) (reproduced in WALTERSCHEID, *supra* note 19, at App’x VI).

47. Patent Act of 1836, § 15, 5 Stat. 117.

fault or intent.⁴⁸ In *Pirkel v. Smith*, for example, the trial court noted that ignorance of the existence of a patent did not relieve a manufacturer of liability for infringement.⁴⁹ In *Parker v. Hulme*, the court stated: “The defendant may have infringed without intending, or even knowing it; but he is not, on that account, the less an infringer.”⁵⁰ Similarly, in *Matthews v. Skates*, the court noted that a defendant “might not even know there was such a patent, and yet infringe on it.”⁵¹ In *Thompson v. N.T. Bushnell Co.*, the court found that liability attached even where the infringement was claimed to be accidental.⁵² In *Bate Refrigerating v. Gillett*, the court grounded the patent liability standard in the old adage that all are assumed to know the law: “The allegation that the defendants were ignorant of the existence of the patent is, of course, no defense. The patent was a public record, of which all persons were bound to take notice.”⁵³

The early US Supreme Court took a similar stance. In 1850, the Court found that direct infringement liability would attach even in the absence of intent, noting that “[t]he intent not to infringe . . . never exonerates . . . from all damages for the actual injury or encroachment, though it may mitigate them.”⁵⁴ In 1854, the Court

48. See, e.g., *Kansas City S. Ry. Co. v. Silica Prods. Co.*, 48 F.2d 503, 508 (8th Cir. 1931) (purpose and intent of infringer are immaterial in determining infringement); *Kawneer Mfg. Co. v. Toledo Plate & Window Glass Co.*, 232 F. 362, 367 (E.D. Mich. 1915) (“The defendant’s intention . . . has nothing to do with the question of infringement so long as it sold the infringing devices.” (citations omitted)). We do not have records of the decisions made under the earliest patent acts. Walterscheid noted that “[a]lthough there is indirect evidence of infringement actions” being brought soon after the 1790 Act took effect, there is only one known, recorded opinion involving a patent issued under that Act, and the patent itself (which was partially invalidated in the opinion) is lost. WALTERSCHEID, *supra* note 19, at 158–59. He further noted that there were no reported patent cases in the United States until the early years of the nineteenth century, *id.* at 355, and only fifty-eight reported or referenced cases at the circuit court level through 1835, *id.* at 359. It is impossible to know for certain how many patent cases were decided at the trial or circuit court level through 1836, because cases were not routinely reported during this time period. *Id.* at 361.

49. 42 F. 410, 411 (C.C.E.D.N.Y. 1890) (“[T]he statute does not include knowledge of the patent among things necessary to create . . . liability.”); see also *Royer v. Coupe*, 29 F. 358, 361 (C.C.D. Mass. 1886) (holding that an infringer “cannot excuse himself by alleging or by providing even, if he can prove it, that he was not aware of rights of the patentee”).

50. 18 F. Cas. 1138, 1143 (C.C.E.D. Pa. 1849).

51. 16 F. Cas. 1133, 1135 (C.C.S.D. Ala. 1860).

52. 96 F. 238, 243 (2d Cir. 1899) (“[T]he owner of a patent is entitled to protection against the repetition of accidental infringements.”).

53. 31 F. 809, 816 (C.C.D.N.J. 1887). This manner of describing patent infringement by its effects rather than a label persisted into the mid-twentieth century. See, e.g., *Blair v. Westinghouse Elec. Corp.*, 291 F. Supp. 664, 670 (D.D.C. 1968) (“It is, of course, elementary, that an infringement may be entirely inadvertent and unintentional and without knowledge of the patent.”).

54. *Hogg v. Emerson*, 52 U.S. 587, 607–08 (1850).

remarked upon the injustice of an innocent or good faith infringer being held liable for enhanced damages in the same manner that a “wanton and malicious pirate” would be.⁵⁵ However, the Court did not object to the imposition of liability itself upon the innocent infringer, but rather the trebling of damages that was automatically required under the 1793 and 1800 Patent Acts.⁵⁶

By contrast, the earliest patent law commentators did not address the lack of an intent or knowledge element for direct patent infringement. For example, the first US treatise on patent law, written by Fessenden in 1810, did not discuss this aspect of patent infringement liability, nor did Phillips’s 1837 treatise, which simply acknowledged the “exclusive” nature of a patent.⁵⁷ The dearth of scholarly commentary on the liability-without-fault standard of direct patent infringement suggests that this standard was not viewed at the time as unusual, harsh, or even noteworthy.

By the late nineteenth century, commentators began explicitly acknowledging the lack of an intent or knowledge element in direct patent infringement, but they accepted this state of affairs matter-of-factly and merely described it, without analyzing or justifying it. Thus, Walker, in his 1883 treatise, stated: “To constitute an infringement of a patent, it is not necessary that the infringer should have known of the existence of the patent at the time he infringed it; or, knowing of its existence, it is not necessary that he should have known his doings to constitute an infringement.”⁵⁸ Similarly, Robinson, in his leading patent treatise of 1890, noted that a patentee “can prohibit the enjoyment of the invention to all persons whomsoever, even although they are original inventors like himself”⁵⁹ and that “the intention with which an act of infringement is performed is immaterial.”⁶⁰ In 1911, Hopkins wrote that “the fact that the alleged infringer had no knowledge of the patent at the time of the

55. Seymour v. McCormick, 57 U.S. 480, 488 (1854).

56. *Id.*; see also Patent Act of 1793, 1 Stat. 318 § 5 (setting damages at “three times the price, for which the patentee has usually sold or licensed to other persons, the use of said invention”); Patent Act of 1800, 2 Stat. 37 § 3 (setting damages at “three times the actual damage sustained by such patentee”). The Patent Act of 1793 had not contained a treble damages measure, and the Patent Act of 1836 simply provided that the jury would “assess actual damages,” with the court having discretion to enhance damages up to three times that amount. Patent Act of 1836, § 14, 5 Stat. 117.

57. PHILLIPS, *supra* note 44, at 2.

58. ALBERT H. WALKER, TEXT-BOOK OF THE PATENT LAWS OF THE UNITED STATES OF AMERICA § 377, at 292 (1883) (footnotes omitted).

59. 3 WILLIAM CALLYHAN ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS § 848 (1890) (footnotes omitted).

60. *Id.* § 901.

alleged infringing acts, is no defense to the charge of infringement,” nor is the fact “that the defendant has submitted the alleged infringing device to experts and been advised that it did not infringe.”⁶¹

The emergence of scholarly acknowledgment of the patent liability standard coincided with the evolution of tort law in US legal doctrine. Perhaps as courts and commentators became increasingly concerned with the appropriate liability standard to apply to newly defined tortious behavior that resulted in harm to persons and property, that environment of heightened scrutiny and analysis of liability standards enticed patent commentators to more explicitly articulate the liability standards associated with patent infringement as well. All we can say for certain, however, is that while commentators described patent infringement liability standards in greater detail in this time period, they did not analyze the theoretical bases or justifications for such liability in any detail.

B. The Emergence of Tort Law and Strict Liability

It is hard for a modern legal scholar, steeped in the prominent role that tort doctrine plays in contemporary American law, to fully grasp just how exceptional—and dubious—the concept of tort was during the mid-1800s. White, in his study of the intellectual history of American tort law, highlighted the late arrival of tort on the American legal landscape: “The first American treatise on Torts appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook was published in 1874.”⁶² Prosser and Keeton provided two additional examples illustrating the same point: first, when Joel Bishop, a leading nineteenth century legal scholar,⁶³ proposed to write a book on tort law in 1853, he was told by publishers that there was no market for such a book and that “if the book were written by the most eminent and prominent author that ever lived, not a dozen copies a year could be sold.”⁶⁴ Second, the “leading” American law journal of the time stated in 1871, “We are inclined to think that Torts is not a proper subject for a law book.”⁶⁵

61. 1 JAMES LOVE HOPKINS, THE LAW OF PATENTS § 274, at 341–42 (1911) (footnote omitted).

62. WHITE, *supra* note 29, at 3.

63. See Stephen A. Seigel, “Bishop, Joel Prentiss,” in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 47 (2009).

64. PROSSER & KEETON, *supra* note 27, § 1, at 1 n.1 (citation omitted).

65. *Id.* § 1, at 1 (citing 5 AM. L. REV. 341 (1871)).

It was not until the 1850s, when the ancient writ system was gradually being supplanted in most states by modern procedural codes,⁶⁶ that torts began to emerge as a “distinct branch of law,”⁶⁷ spurred on by both the exigencies of rapid industrialization and the evolution of jurisprudential theory.⁶⁸ The development of tort law was continuous but uneven over the next four decades, and tort law finally gained status as “a discrete branch of law” in the late 1800s.⁶⁹

The emergence of tort law signaled a notable change in American legal philosophy.⁷⁰ Courts increasingly realized that the public interest played an important role in the development of tort doctrine, both in terms of ensuring a sound body of precedent and in terms of promoting the interests of society overall.⁷¹ While the primary objective of tort law was to fairly resolve disputes between opposing parties⁷² and the critical inquiry was “whether something about the circumstances of the plaintiff’s injury compelled the defendant to pay the plaintiff damages,”⁷³ this inquiry was recognized as having broader social implications as well, such as ensuring that individuals resolved their disputes peaceably in the courts rather than through “private vengeance.”⁷⁴

In particular, there was a growing movement toward employing “fault” or “moral responsibility” as the touchstone for evaluating wrongdoing and the availability of remedies.⁷⁵ However, the “fault” at issue was viewed in terms of “social morality,” not personal moral blameworthiness.⁷⁶ As Prosser explained, “fault,” in legal terms, meant “no more than a departure from the conduct required of a man by society for the protection of others, and it is the public and social interest which determines what is required.”⁷⁷ That public interest encompassed a significant desire for economic growth. The movement away from the liability-without-fault standard of the traditional writ of trespass to a negligence-based standard for tort was thus in large

66. See PROSSER, *supra* note 29, § 4, at 19; WHITE, *supra* note 29, at 10.

67. PROSSER & KEETON, *supra* note 27, § 1, at 1.

68. WHITE, *supra* note 29, at 3.

69. *Id.*

70. PROSSER, *supra* note 29, § 3, at 15. White outlined this process in WHITE, *supra* note 29, ch. 2.

71. PROSSER, *supra* note 29, § 3, at 17.

72. *Id.*

73. WHITE, *supra* note 29, at 14.

74. PROSSER, *supra* note 29, § 56, at 426.

75. *Id.* at 427. Tort liability based upon “fault” is commonly traced to *Brown v. Kendall*, 60 Mass. (6 Cushing) 292 (1850). See generally WHITE, *supra* note 29, at 14–16.

76. PROSSER, *supra* note 29, § 4, at 21.

77. *Id.*

part stimulated by the desire to promote industrialization and the growth of commerce by creating “immunities from legal liability . . . thereby to provide substantial subsidies for those who undertook schemes of economic development.”⁷⁸

It is worth pausing here to consider the role of patent law in the industrialization goals of the country during this period. While the liability-limiting standard of negligence was seen as important to the economic growth of the country, the patent acts continued to impose a liability-without-fault standard for infringement. These two positions were in no way inconsistent, however, as strong protection of inventive efforts (via strong patent laws) was also seen as a critical contributor to economic development. As Walterscheid pointed out in his foundational work on the history of the Intellectual Property Clause, the origins of this clause are murky.⁷⁹ Walterscheid speculated, however, that the delegates to the Constitutional Convention copied the English practice of granting exclusive rights for patents and copyrights, and that they did so for “purely a pragmatic” reason: a newly born, poor national government, facing extensive debt from the Revolutionary War, adopted an approach that would encourage the desired growth of manufacturing and knowledge but at less cost than other schemes being contemplated, “while at the same time providing the desired pecuniary incentive to inventors and authors.”⁸⁰ In short, the early Congresses likely viewed the liability-without-fault standard of the patent acts as a way of supporting nascent industry and furthering the national goal of economic development, and would not have seen that standard as being in conflict with emerging tort law.

1. The Historical Evolution of Strict Liability

Although notions of fault began to dominate torts theory in the late nineteenth century,⁸¹ liability without fault was retained for certain wrongs and injuries,⁸² including liability for injuries caused by trespassing animals or by the keeping of wild animals.⁸³ Initially, these liability actions were considered extraordinary forms of actions.

78. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 100 (1977); *see also* LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 300 (2d ed. 1985); Gregory, *supra* note 26, at 365.

79. WALTERSCHEID, *supra* note 38, at 83.

80. *Id.* at 91; *see also* B. Zorina Khan, *Property Rights and Patent Litigation in Early Nineteenth-Century America*, 55 J. ECON. HIST. 58 (1995).

81. See PROSSER, *supra* note 29, § 56, at 427–28; WHITE, *supra* note 29, at 12–19.

82. WHITE, *supra* note 29, at 108.

83. See PROSSER, *supra* note 29, § 57.

White, for example, noted that Burdick's 1926 seminal treatise on torts categorized these actions under the heading of "peculiar liability,"⁸⁴ highlighting their exceptional nature.

Courts initially were wary of the strict liability standard and were hesitant to adopt it.⁸⁵ The strict liability principle of *Rylands v. Fletcher*,⁸⁶ for example, was unpalatable to many early American courts as it seemed to impose inordinate liability upon a young country struggling to industrialize.⁸⁷ Thus, in *Brown v. Collins*,⁸⁸ the New Hampshire Supreme Court rejected the natural/non-natural use of land distinction made by Lord Cairns in *Rylands*, stating such a rule "would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement."⁸⁹ Similarly, in *Losee v. Buchanan*,⁹⁰ the New York Court of Appeals rejected strict liability for property damage caused by a steam boiler explosion, stating:

We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all of our civilization. If I have these on my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor.⁹¹

By the 1930s, however, the pendulum had swung the other way. Scholars began to identify strict liability as a separate and independent category of torts, as opposed to a collection of exceptions to negligence liability,⁹² a change that arose out of the growing sense that tort law was indeed "an instrument of social policymaking."⁹³ This also led commentators to explore the theoretical bases for strict

84. WHITE, *supra* note 29, at 108 (citing FRANCIS BURDICK, THE LAW OF TORTS § 67, at 536 (4th ed. 1926)). Earlier editions of Burdick's treatise did discuss the liability of those engaged in "extra hazardous activities," see FRANCIS BURDICK, THE LAW OF TORTS 445 (1906), but found that the broad doctrine of *Rylands v. Fletcher* was generally not adopted in American courts, *id.* at 447, and that absolute liability was applied only in "exceptional" cases, *id.* at 449.

85. WHITE, *supra* note 29, at 110.

86. L.R. 3 H.L. 330 (1868).

87. See Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 260–63 (1987) (discussing reaction of American courts to *Rylands*).

88. 53 N.H. 442 (1873).

89. *Id.* at 448.

90. 51 N.Y. 476 (1873).

91. *Id.* at 484–85.

92. WHITE, *supra* note 29, at 109.

93. *Id.*

liability. For example, Harper, in his 1933 treatise, argued that the objective of strict liability was “allocating a probable or inevitable loss in such a manner as to entail the least hardship upon any individual and thus to preserve the social and economic resources of the community.”⁹⁴ Similarly, Prosser devoted a section of his 1941 treatise to the discussion of strict liability, examining several categories to which strict liability was applied, including injuries caused by animals, fire, and “dangerous things and activities.”⁹⁵ He noted that there was “a general acceptance of the principle that the defendant may be liable, although he not only is charged with no moral wrongdoing, but has not departed in any way from a reasonable standard of intent or care.”⁹⁶ The strict liability standard was a way of ensuring that the costs of such dangerous undertakings were borne by the public, not by the injured plaintiff.⁹⁷ The defendant, who presumably would benefit from the pursuit of the dangerous activity (or he or she would not pursue it), was in a position to spread the risk of harm (e.g., by charging slightly higher prices to each of his or her customers) and that risk-spreading was fairer than imposing the entire cost on the injured party.⁹⁸ As Prosser summed it up, the strict liability defendant, “although he departs in no way from ordinary standards, must proceed ‘at his peril,’ and his conduct is regarded as tortious, not because it is morally or socially wrong, but because as a matter of social engineering the responsibility must be his.”⁹⁹

At the same time, courts began adopting strict liability for injuries resulting from unusually dangerous conditions or activities,¹⁰⁰ reflecting a growing sense that while the defendant’s activity might have social utility and hence should not be banned outright, fairness dictated that the defendant should bear the costs of any loss caused by the undertaking of the activity.¹⁰¹ Then, between the 1940s and the early 1970s, there was an explosion of interest, judicial and scholarly,

94. FOWLER V. HARPER, *THE LAW OF TORTS* 334 (1933) (quoted in WHITE, *supra* note 29, at 109).

95. PROSSER, *supra* note 29, § 59. Prosser also noted that “[t]he principle of strict liability [was] being extended, both by statute and by the common law, into other fields,” *id.* at 466, citing the Federal Safety Appliance Act, the Uniform Aeronautics Act, child labor laws, dramshop acts, and pure food acts, *id.* at 467–68.

96. *Id.* § 56, at 428.

97. *Id.* at 439 (strict liability was intended to “allocat[e] a more or less inevitable loss to be charged against a complex and dangerous civilization, and [to place] liability . . . upon the party best able to shoulder it”).

98. See *id.* at 429.

99. *Id.* at 430.

100. See Nolan & Ursin, *supra* note 87, at 264.

101. PROSSER, *supra* note 29, § 56, at 429.

in strict products liability, spurred in large part by Judge Traynor's concurrence in *Escola v. Coca-Cola Bottling Co.* in 1944, in which he argued for absolute liability for product defects on public policy grounds,¹⁰² and by Prosser's 1960 groundbreaking article, *The Assault Upon the Citadel*, in which he advocated the expansion of strict liability for product defects.¹⁰³ These two pivotal works were followed by several influential state court opinions in the 1960s and early 1970s,¹⁰⁴ as well as the drafting of Section 402A of the Restatement (Second) of Torts, which broadened the notion of strict liability for product defects and for which Prosser was the reporter.¹⁰⁵ The growth of strict products liability law was rapid and expansive, and it quickly became, in the words of one commentator, the "quintessential torts creature of the twentieth century."¹⁰⁶

2. Modern Strict Liability Doctrine

The rise of products liability in the latter half of the twentieth century gave birth to a robust body of literature exploring and identifying the rationales for strict liability,¹⁰⁷ both in the products

102. 150 P.2d 436, 440–41 (1944) (Traynor, J., concurring).

103. William Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960).

104. See, e.g., Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (Or. 1974); Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81 (N.Y. 1963); Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

105. RESTATEMENT (SECOND) OF TORTS § 402(A) (AM. LAW INST. 1965).

106. MARSHALL S. SHAPO, SHAPO ON THE LAW OF PRODUCTS LIABILITY § 7.01, at 703 (2012).

107. In addition, there seemed to be a shift in liability definitions in the mid-twentieth century. Prior to the 1960s, the commentary suggested that "absolute" and "strict" liability were synonymous (with the latter being perhaps the more "modern" term). See Walter H.E. Jaeger, *The Warranty of Habitability*, 47 CHI.-KENT L. REV. 1, 1–2 (1970). For example, Ehrenzweig seemed to equate "strict" and "absolute" liability in the early 1950s, but then concluded that "[t]he term 'strict liability' now seems to be generally preferred." Albert A. Ehrenzweig, *Negligence Without Fault*, 54 CAL. L. REV. 1422, 1450 n.1 (1966) (reprint of an article from 1951); see also Robert W. James, Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CAL. L. REV. 269, 270 n.4 (1949) ("Although the term 'absolute liability' will be used through this comment to conform to the terminology of the Restatement of Torts, the terms 'strict liability' or 'liability without fault' appear somewhat more descriptive of the nature of the liability imposed." (citing James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 97–100 (1908))). However, some commentators suggest that the terms differ in that strict liability has affirmative defenses but that absolute liability has no defenses. See, e.g., Percy H. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 51 (1926); Franck C. Woodside III, et al., *Why Absolute Liability Under Rylands v. Fletcher Is Absolutely Wrong!*, 29 U. DAYTON L. REV. 1, 6 (2003).

In 1968, Wade offered a pragmatic solution to the vocabulary conundrum:

There are three expressions which are often treated as synonymous—"strict liability," "liability without fault," and "absolute liability." Clearly, what is

defects area and elsewhere.¹⁰⁸ Today, strict liability is commonly defined as “liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence.”¹⁰⁹

Modern strict liability is often based in common law, e.g., for injuries caused by trespassing animals or the keeping of wild animals, abnormally dangerous activities,¹¹⁰ and products liability.¹¹¹ However, it has counterparts in the modern statutory context as well, in areas such as workers’ compensation acts,¹¹² federal securities regulation,¹¹³ and environmental regulations.¹¹⁴ In these areas, the imposition of statutory strict liability often mirrors the traditional common law settings of strict liability. For example, the strict liability imposed

involved is not an insurer’s liability. It is not accurate to call it “absolute.” And the term “fault” has so many meanings and connotations that arguments can quickly be started as to whether fault is involved The expression, “strict liability,” is less definite and therefore less inaccurate or misleading and so, more acceptable.

John W. Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233, 242 (1968).

The patent statutes have never incorporated any of these terms. “Liability without fault” appears to be the best cognomen for the statutory standard of liability that attaches to direct patent infringement. In any event, as discussed in Part III below, “strict liability” is a term fraught with policy considerations and theoretical justifications that have no application to direct patent infringement doctrine, so whatever term is adopted, it ought not to be that one.

108. See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981); Steven Shavell, *Strict Liability v. Negligence*, 9 J. LEGAL STUD. 1 (1980); Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Barbara Ann White, *Economizing on the Sins of our Past: Cleaning up Our Hazardous Wastes*, 25 HOUS. L. REV. 899, 915–17 (1988).

109. PROSSER & KEETON, *supra* note 27, § 75, at 534.

110. See RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. LAW INST. 1977).

111. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. LAW INST. 1998); RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

112. See Jeremiah Smith, *Sequel to Workmen’s Compensation Acts*, 27 HARV. L. REV. 235 (1914) for a discussion of the development of these acts.

113. See Securities Act of 1933 §11, 15 U.S.C. § 77k (2012), and § 12, 15 U.S.C. § 77l(a)(2) (2012); Securities Exchange Act of 1934 § 16, 15 U.S.C. § 78p(b) (2012).

114. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012).

under the Comprehensive Environmental Response, Compensation, and Liability Act¹¹⁵ (CERCLA) for cleanup of hazardous waste explicitly draws upon the common law's notion of strict liability for injuries caused by abnormally dangerous activities, as well as products liability.¹¹⁶ Similarly, workers' compensation statutes, like products liability doctrine, impose strict liability because, while the defendant's activity is socially beneficial (e.g., the providing of jobs), it carries substantial risks of injury that the legislature has deemed should best be borne by the defendant.¹¹⁷ As Prosser explained: "The financial burden is lifted from the shoulders of the employee, and placed on the employer, who is expected to add it to his costs, and so to transfer it to the consumer."¹¹⁸

Again, it is worth pausing to note that these rationales offered for strict liability—allocation of loss and risk-spreading in the context of socially beneficial activities—do not apply to patent infringement liability. There is no sense in patent law that a defendant's infringement may be a socially beneficial activity that will be tolerated provided the defendant pays for the harm caused the plaintiff. Indeed, patent infringement is routinely enjoined, at least where the plaintiff is a practicing entity.¹¹⁹

115. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)).

116. See generally Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 598–603 (1993) (discussing legislative history of adoption of strict liability standard in CERCLA). Section 101(32) of CERCLA provides that the "standard of liability" under CERCLA is to be the same as that under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which has been interpreted by courts as being strict liability. See, e.g., United States v. Tex-Tow, Inc., 589 F.2d 1310, 1312–13 (7th Cir. 1978); United States v. Bear Marine Servs., 509 F. Supp. 710, 713–14 (E.D. La. 1980) (dictum). See generally New York v. Shore Realty Co., 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing background of CERCLA's strict liability standard and its derivation from the Clean Water Act).

117. See Henry H. Foster, *Statutory Strict Liability*, 39 A.B.A. L.J. 1015, 1015 (1953) ("Since the upholding of the constitutionality of workmen's compensation acts, it is generally accepted that there is legislative power to enact either tort or criminal strict liability statutes."); Peck, *supra* note 37, at 235–36 ("[T]he enactment of workmen's compensation acts throughout the United States reflects the conclusion that imposition of strict liability upon employers is an appropriate way to deal with industrial accidents.") (citing 2 FOWLER V. HARPER & FLEMING JAMES, THE LAW OF TORTS 730–33 (1956); WILLIAM PROSSER, THE LAW OF TORTS 554–58 (3d ed. 1964)). Gregory highlighted the statutory nature of strict liability in workers' compensation statutes, stating: "Our legislatures have been far in advance of our courts about introducing and frankly acknowledging the idea of absolute liability without fault," and noting that workers' compensation statutes were the "most important legislative development" of this type. Gregory, *supra* note 26, at 385; see also Wade, *supra* note 107, at 240 (stating that workers' compensation statutes are "statutory in form and [do] not sound in tort, but . . . accomplish the same result").

118. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 80, at 531 (4th ed. 1971).

119. A recent study indicates that, despite the Supreme Court's edict in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)—that injunctions should not issue automatically but

In sum, the emergence of tort law in general, and the evolution of strict liability in particular, in American law is a considerably later development than the statutory creation of patent rights and statutory imposition of liability without fault for infringement of those rights. As long as direct patent infringement was viewed as a statutory liability-without-fault regime, the two doctrinal systems did not collide. The importation of the “strict liability” terminology into patent case law in 1995, however, set the Federal Circuit on an inevitable path toward doctrinal error, culminating in its ill-fated 2012 *en banc* decision in *Akamai*.

III. THE ADOPTION OF “STRICT LIABILITY” IN PATENT INFRINGEMENT DOCTRINE

To recap, at the time Congress enacted the Patent Act of 1790, the theories and rationales of tort law were not yet articulated. The liability-without-fault standard of early patent law thus was not grounded in tort doctrine and theory, but rather can be best viewed as a natural consequence of the classification of patents as property and the statutory exclusivity granted to the patent itself, and influenced by the liability-without-fault standard that historically applied to actions arising under the writ of trespass.¹²⁰ Throughout the tort revolution of the late nineteenth and early twentieth centuries, direct patent infringement remained a statutory liability-without-fault standard.

At no point has a US Patent Act employed the term “strict liability,” nor does the term appear to have been used by a commentator to describe direct patent infringement before 1982.¹²¹ Furthermore, it was not until 1995 that the “strict liability” label was first adopted by the federal courts. In *Hilton Davis Chemical Co. v. Warner-Jenkinson Co.*, the Federal Circuit noted that “[i]nfringement is, and should remain, a strict liability offense.”¹²² Once articulated by

rather should be evaluated under a four-factor test—permanent injunctions issue in the “vast majority” of cases involving practicing entities (although they are almost always denied to non-practicing entities). See Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 2006 (2016).

120. See *supra* notes 30–37 and accompanying text.

121. See, e.g., A. Samuel Oddi, *Contributory Infringement/Patent Misuse: Metaphysics and Metamorphosis*, 44 U. PITTS. L. REV. 73, 87 (1982) (“[D]irect infringement under section 271(a) . . . is an intentional tort requiring knowledge on the part of the seller of the nonstaple of its infringing use.”).

122. 62 F.3d 1512, 1527 (Fed. Cir. 1995) (*en banc*), *rev’d on other grounds*, 520 U.S. 17 (1997); see also *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (“Because patent infringement is a strict liability offense, the nature of the offense is only relevant in determining

the Federal Circuit, the strict liability label took hold quickly and, as noted earlier, today courts¹²³ and commentators¹²⁴ routinely assert that direct patent infringement is a strict liability offense.

Despite being the genesis of the strict liability label for direct patent infringement, the Federal Circuit has seemed troubled in recent years by the implications of applying this unforgiving standard to various forms of direct patent infringement. The 2012 *en banc* Federal Circuit opinion in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*,¹²⁵ highlights the complicated relationship between direct patent infringement and strict liability and underscores the hazards of using imprecise or inapt vocabulary to define the parameters of statutory patent infringement.

The 2012 *Akamai en banc* decision arose out of a critical gap in statutory patent infringement provisions that has been accentuated by

whether enhanced damages are warranted."); *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 n.2 (Fed. Cir. 1996) ("Infringement itself, however, is a strict liability offense" (citing *Warner-Jenkinson*, 62 F.3d at 1527)). By contrast, strict liability made an earlier appearance in copyright law. The Second Circuit, in a 1963 copyright infringement case, noted that courts and commentators had complained about "the harshness of the strict liability principle in copyright law." *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963) (citing *Barry v. Hughes*, 103 F.2d 427 (2d Cir. 1939)); *Zechariah Chafee, Jr., Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 526–27 (1945); cf. *De Acosta v. Brown*, 146 F.2d 408, 413 (2d Cir. 1944) (L. Hand, J., dissenting)).

123. See *supra* note 2.

124. See *supra* note 3.

125. 692 F.3d 1301 (Fed. Cir. 2012) (*en banc*) (per curiam) (depublished), *rev'd & remanded*, 134 S. Ct. 2111 (2014), *on remand*, 786 F.3d 899 (2015), *rev'd*, 797 F.3d 1020 (2015) (*en banc*) (per curiam). The 2012 *Akamai en banc* decision actually involved two combined cases, each of which illustrated a somewhat different variation on the multi-actor patent infringement theme. *Id.* at 1305. In *Akamai*, the defendant furnished instructions to its customers that allowed them to undertake the missing steps needed to complete the claimed method at issue. (The claimed method involved improved methods for storing webpage content and is described in detail at 692 F.3d at 1333–34 (Newman, J., dissenting)). In *McKesson Technologies, Inc. v. Epic Systems Corp.*, the defendant undertook acts knowing—or substantially certain—that another party would undertake additional acts that, when combined, would lead to infringement of the method patent at issue. 98 U.S.P.Q.2d (BNA) 1281, 2011 U.S. App. LEXIS 7531 (Fed. Cir. Apr. 12, 2011), *rev'd en banc*, 463 F. App'x 906 (Fed. Cir. 2011) (per curiam) (depublished), *rev'd sub nom Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012) (the claimed method involved the use of personalized web pages to foster electronic communications between healthcare providers and their patients, and is described in detail at 692 F.3d at 1335–36 (Newman, J., dissenting)). In both cases, the involved method necessarily contemplated the participation of multiple parties in completing the steps of the claims, and thus both cases posed the doctrinally difficult question of how a court should evaluate the potential liability of multiple parties whose individual actions would have to be aggregated to form the acts necessary to infringe a multi-step process or method claim. See Lynda J. Oswald, *Simplifying Multiactor Patent Infringement Cases Through Proper Application of Common Law Doctrine*, 51 AM. BUS. L.J. 1, 3, 11–13 (2014) (defining multi-actor patent infringement).

the growing prevalence of multi-step process or method patents.¹²⁶ Such patents are common, for example, in the medical diagnostics and devices field¹²⁷ and the cloud computing¹²⁸ sector. The Patent Act does not address the complicated issue of assigning direct infringement liability where various steps of a method or process patent are performed by different parties, particularly parties who are co-equals or who have no contractual or other type of relationship with each other.¹²⁹

Over the past century the federal courts developed a complex, and often conflicting, collection of standards and tests for addressing the multi-actor infringement scenario.¹³⁰ The 2012 *Akamai en banc* decision was an effort by the Federal Circuit to clarify the standard of liability for such infringement, but the attempt failed, resulting in a divisive 6-5 split with two dissenting opinions. All three opinions explicitly addressed the “strict liability” standard of direct patent infringement, suggesting that the Federal Circuit’s discomfort with this standard that it itself had articulated seventeen years earlier drove the analyses. The majority opinion and one dissenting opinion acquiesced to application of the strict liability label but sought to curb

126. This issue arises only in the context of process or method patents, as direct infringement of a process or method patent occurs only when all steps of the patented process or method claim are performed. *See, e.g.*, Canton Bio Med., Inc. v. Integrated Liner Techs., Inc., 216 F.3d 1367, 1370 (Fed. Cir. 2000). A “process” patent is an operation or series of steps leading to a useful result. *See Gottschalk v. Benson*, 409 U.S. 63, 70 (1972) (quoting *Cochrane v. Deener*, 94 U.S. 780, 787–88 (1876)). A “method” is a series of steps for using a product to achieve a given result. *See NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1312 (Fed. Cir. 2005). The Patent Act specifically defines “process” to include “method.” *See* 35 U.S.C. § 100(b) (2012).

127. *See* Tony Dutra, *Akamai/McKesson Inducement Rule Affects Wide Range of Industries, Practitioners Say*, BNA PAT., TRADEMARK & COPYRIGHT L. DAILY (Sept. 7, 2012), <https://www.bna.com/akamaimckesson-inducement-rule-n17179869600/> [https://perma.cc/3SZX-GEE9].

128. *See* Nicole D. Galli & Edward Gecovich, *Cloud Computing and the Doctrine of Joint Infringement: “Current Impact” and Future Possibilities*, 11 J. MARSHALL REV. INTELL. PROP. L. 672 (2012).

129. The issue of the correct parameters of multi-actor patent infringement doctrine has been discussed by numerous authors and is not addressed further here. *See, e.g.*, Nathaniel Grow, *Joint Patent Infringement Following Akamai*, 51 AM. BUS. L.J. 71 (2014); Keith Jaasma, *Finding the Patent Infringement “Mastermind”: The “Control or Direction” Standard for “Joint” Infringement*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 411 (2010); Mark A. Lemley et al., *Divided Infringement Claims*, 33 AIPLA Q.J. 255 (2005); Mathew Lowrie et al., *The Changing Landscape of Joint, Divided and Indirect Infringement—The State of the Law and How to Address It*, 12 J. HIGH TECH. L. 65 (2011); Oswald, *supra* note 125; W. Keith Robinson, *No “Direction” Home: An Alternative Approach to Joint Infringement*, 62 AM. U. L. REV. 59 (2012); Sriranga Veeraraghavan, *Joint Infringement of Patent Claims: Advice for Patentees*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 211 (2006); Dolly Wu, *Joint Infringement and Internet Software Patents: An Uncertain Future?* 91 J. PAT. & TRADEMARK OFF. SOCY 439 (2009).

130. *See* Oswald, *supra* note 125, at 26–57 (discussing tests).

the outer reaches of such liability. However, the second dissent, authored by Judge Newman, rejected the strict liability standard altogether as inapposite to statutory patent law.

The *en banc* majority issued a per curiam opinion in which it reiterated the Federal Circuit's earlier stance that "direct infringement is a strict liability tort."¹³¹ According to the *en banc* majority, the Federal Circuit had not extended direct infringement liability to instances where multiple unrelated parties undertook the necessary steps of a process or method claim¹³² because of the court's concern that the strict liability standard would lead to an over-expansive extension of liability, inappropriately "ensnar[ing] actors who did not themselves commit all the acts necessary to constitute infringement."¹³³

The majority then went on to find that it was not compelled to address the liability of multiple actors for patent infringement under the direct infringement provision of Section 271(a) of the Patent Act because such cases could instead be resolved under the indirect induced infringement provision of Section 271(b), which has a specific intent element.¹³⁴ This intent requirement, the majority reasoned, meant that there was less "risk of extending liability to persons who might be unaware of the existence of a patent or even unaware that others are practicing some of the steps claimed in the patent."¹³⁵ By moving multi-actor infringement liability from direct to indirect infringement, the *en banc* majority thus reduced the scope of liability from a broad "strict liability" standard to a narrower "intent-based" liability.

The hitch, however, is that both Supreme Court precedent¹³⁶ and logic¹³⁷ dictate that indirect infringement must be supported by direct infringement; indirect infringement cannot exist in isolation. In

131. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1307 (Fed. Cir. 2012) (*en banc*) (per curiam) (depublished), *rev'd & remanded*, 134 S. Ct. 2111 (2014), *on remand*, 786 F.3d 899 (2015), *rev'd*, 797 F.3d 1020 (2015) (*en banc*) (per curiam).

132. *Id.*

133. *Id.* (citing *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (*en banc*)). The *en banc* majority did concede, however, that strict direct infringement liability may attach where the parties have "an agency relationship between the actors or some equivalent." *Id.*

134. *Id.* at 1308 n.1. Section 271(b) provides: "Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b) (2012).

135. *Akamai*, 692 F.3d at 1308 n.1.

136. *Id.* at 1308 (citing *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 526 (1972); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961); *Henry v. A.B. Dick Co.*, 224 U.S. 1, 12 (1912)).

137. *Id.* ("There is no such thing as attempted patent infringement, so if there is no infringement, there can be no indirect liability for infringement.").

addition, the Federal Circuit's own precedent in *BMC Resources, Inc. v. Paymentech*¹³⁸ five years earlier had created "the single entity rule," which, in addition to stating direct infringement is a predicate to indirect infringement, held that "liability for direct infringement requires that a single party commit all the acts necessary to constitute infringement."¹³⁹ The conundrum facing the 2012 *Akamai en banc* majority, then, was that it wanted to place multi-actor infringement under the induced infringement umbrella (so as to avoid strict liability), but doing so left the court with no direct infringer to support the claim. The majority attempted to evade the issue by articulating a tenuous and fragile distinction: "[A] party may be held liable for inducing infringement even if none of the individuals whose conduct constituted infringement would be liable, as direct infringers, for the act of infringement that was induced."¹⁴⁰ In short, the majority found, there could be an indirect infringer even in the absence of a direct infringer—a stunning rewriting of precedent and doctrine in an effort to avoid the strict liability standard.

Judge Linn wrote a dissent in the 2012 *Akamai en banc* decision, in which three other judges joined. Those four dissenters agreed that direct patent infringement is a strict liability offense.¹⁴¹ However, they disagreed with the majority's re-categorization of multi-actor infringement as indirect infringement under Section 271(b), arguing that the court lacked authority to revise the doctrine of induced infringement to eliminate the predicate of direct infringement required under existing Supreme Court precedent.¹⁴² The Linn dissent would have left multi-actor infringement under the umbrella of direct infringement¹⁴³ but would have employed *BMC Resources*'s "single entity rule" as a means for tempering strict liability's more severe effects.¹⁴⁴

138. 498 F.3d 1373 (Fed. Cir. 2007), *overruled by Akamai*, 692 F.3d 1301.

139. *Akamai*, 692 F.3d at 1308.

140. *Id.* at 1313. The majority saw this result as analogous to other areas of the law that would impose liability upon a party who uses an innocent third party to commit a tort, citing examples of fraud, fraudulent misrepresentation, and odometer tampering. *Id.* at 1313–14 (citations omitted). The majority explained that nothing in the language of either section 271(a) or (b) specifies that "the act of 'infringement' required for inducement under section 271(b) must qualify as an act that would make a person liable as an infringer under section 271(a))." *Id.* at 1314.

141. *Id.* at 1347 (Linn, J., dissenting).

142. *Id.* at 1342 (citing *Mayo Collaborative Servs. v. Prometheus*, 132 S. Ct. 1289, 1305 (2012)).

143. See *id.* at 1347.

144. See *id.*

By contrast, Judge Newman's solo dissent tackled head-on and in detail the ramifications of the Federal Circuit's strict liability characterization of direct patent infringement.¹⁴⁵ Judge Newman asserted that direct patent infringement is not correctly labeled a strict liability offense.¹⁴⁶ Rather, she maintained, strict liability is a tort principle applicable to injuries arising from inherently dangerous activities and has no place in patent infringement doctrine.¹⁴⁷ This mislabeling of the liability standard for direct patent infringement, she argued, led the majority to incorrectly conclude that "every participant in an interactive or collaborative method is fully responsible for the entire harm caused by the infringement."¹⁴⁸ Judge Newman supported her stance by citing favorably a 2002 law review article by Blair and Cotter, who, she stated, properly recognized the "inapplicability" of the strict liability standard to direct patent infringement.¹⁴⁹

A close reading of that article reveals, however, that Blair and Cotter did not completely dismiss the notion of direct patent infringement being strict liability. Rather, they noted that direct patent infringement is "often characterized" as a strict liability offense and that "in some ways it is."¹⁵⁰ But, Blair and Cotter cautioned, direct patent infringement "is not strict liability in the purest sense, or at least not in the sense in which the term is used in general tort law."¹⁵¹ In the common law tort context, they noted, strict liability normally arises as a result of unusually dangerous activities or products liability.¹⁵² In the statutory context of patent law, direct infringement is a strict liability offense in that parties can be held liable even if the infringement was unintentional or inadvertent, and

145. *Id.* at 1319–36 (Newman, J., dissenting).

146. *Id.* at 1331 ("Although the term 'strict liability' has crept into patentese, it does not have the consequences given by my colleagues.").

147. *Id.* at 1330.

148. *Id.* (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2065 n.2 (2011)). By contrast, she asserted, traditional tort law would apportion liability based on such factors "as the relative contribution to the injury to the patentee, the economic benefit received by the tortfeasor, and the knowledge and culpability of the actor," *id.* at 1331; this method, Judge Newman reasoned, would work to appropriately limit liability to relevant parties in "multi-actor patent infringement" cases as well, *id.* at 1332.

149. *Id.* (citations omitted) ("[U]nder a true strict liability standard, damages would be recoverable even before the accused infringer has 'knowledge or notice that the conduct infringes.'").

150. Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 800 (2002).

151. *Id.*

152. *Id.*

the court will generally issue an injunction prohibiting further infringement.¹⁵³

However, under the statutory provisions of the Patent Act, damages are often available only once the plaintiff has been put on notice of the patent (typically through “marking” of the product),¹⁵⁴ and damages are then awarded only for subsequent continuing infringement.¹⁵⁵ Blair and Cotter argued that true strict liability for patent infringement would have no such “accommodation . . . for unintentional infringement,” and that direct patent infringement thus was not a “pure” strict liability standard.¹⁵⁶ Ultimately, Blair and Cotter concluded that while “strict liability” may correctly describe the liability imposed in some instances of direct patent infringement, the term may be “misleading” in those other instances.¹⁵⁷ Their solution to this dichotomy was a pragmatic one: “The standard of liability in patent law simply is what it is and does not need a label.”¹⁵⁸

Although the Supreme Court’s opinion in *Akamai* did not seek to explain the 2012 *en banc* majority’s creation of such a convoluted rule for multi-actor patent infringement, comments of the Justices at oral argument teased out the reason: housing multi-actor patent infringement in direct infringement automatically triggers application of liability without fault or intent under Section 271(a) of the Patent Act, yet the Federal Circuit is uncomfortable with the inherent

153. *Id.* at 800–01.

154. See 35 U.S.C. § 287 (2012). Notice can occur through marking of the patented article, or through other forms of notification to the alleged infringer of the potential infringement (e.g., filing of a lawsuit or a cease-and-desist letter). *See id.* The Federal Circuit has stated that section 287(a) “serves three related purposes: (1) helping to avoid innocent infringement; (2) encouraging patentees to give notice to the public that the article is patented; and (3) aiding the public to identify whether an article is patented.” *Nike v. Wal-Mart Stores*, 138 F.3d 1437, 1443 (Fed. Cir. 1998) (citations omitted) (quoted in Blair & Cotter, *supra* note 150, at 804).

155. 35 U.S.C. § 284(a).

156. Blair & Cotter, *supra* note 150, at 821. As Blair and Cotter went on to note, however, section 287’s provision regarding marking has no application in the context of a process patent, where there is no product embodying the patent to be marked. *Id.* at 804 (citing *Crystal Semiconductor Corp. v. Tritech Microelectronics, Int’l, Inc.*, 246 F.3d 1336, 1353 (Fed. Cir. 2001) (citing *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1538 (Fed. Cir. 1993))). Rather, in that instance, “patent infringement is a strict liability tort in all relevant respects.” Blair & Cotter, *supra* note 150, at 806. Blair and Cotter also note that marking provides constructive notice but not necessarily “actual knowledge,” and so “an ‘innocent’ defendant may still be liable for damages, as under a true strict liability regime.” *Id.*

157. *Id.* at 807, 807 n.21.

158. *Id.* at 807. Blair and Cotter’s primary purpose was to consider alternatives to the existing patent infringement liability scheme; they concluded that the current “modified” strict liability scheme was preferable but that it should be coupled with refinements to the patent marking system. *Id.* at 845.

harshness of such liability.¹⁵⁹ Justice Scalia highlighted this at oral argument when he called direct infringement under Section 271(a) “a strict liability tort,”¹⁶⁰ while noting that inducement of infringement is not. Justice Kagan further underscored this point:

[T]he reason [the Federal Circuit] put this under 271(b) rather than 271(a) is because of what Justice Scalia said, that 271(b) is not a strict liability offense [T]hey thought they were being very clever by putting it into a 271(b) box and avoiding the strict liability consequences of what they were doing¹⁶¹

The Supreme Court unanimously reversed and remanded the Federal Circuit’s 2012 *en banc* decision in a short opinion,¹⁶² finding that the statutory language and structure, as well Supreme Court precedent, mandated reversal of the Federal Circuit’s holding that inducement of infringement could exist even in the absence of direct infringement by another party.¹⁶³ The *Akamai* Court did not address application of the “strict liability” label to direct patent infringement. In fact, recent Supreme Court opinions had avoided the term “strict liability” in describing direct patent infringement liability. Instead, the Court followed the practice of the early federal courts¹⁶⁴ in simply outlining the direct patent infringement liability standard in descriptive language that focused on lack of intent. For example, in 1999, the Court stated: “Actions predicated on direct patent infringement . . . do not require any showing of intent to infringe; instead, knowledge and intent are considered only with respect to damages.”¹⁶⁵ In 2011, the Court stated: “Direct infringement has long been understood to require no more than the unauthorized use of a patented invention. . . . [A] direct infringer’s knowledge or intent is irrelevant.”¹⁶⁶ However, less than a year after its decision in *Akamai*, the Supreme Court abandoned this practice in *Commil USA, LLC v. Cisco Systems*,¹⁶⁷ where it stated: “Direct infringement is a strict-

159. Transcript of Oral Argument at 23, Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111 (2014) (No. 12-786), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-786_i4dj.pdf [<https://perma.cc/G9P7-ECYC>].

160. *Id.* at 21.

161. *Id.* at 23.

162. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014).

163. *Id.* at 2115.

164. See *supra* notes 47–52 and accompanying text.

165. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645 (1999).

166. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 761 n.2 (2011).

167. 135 S. Ct. 1920 (2015).

liability offense.”¹⁶⁸ It remains to be seen what the impact of the Court’s acquiescence in the “strict liability” label for direct patent infringement will have on patent infringement doctrine.

The subsequent history of *Akamai* on remand reveals the Federal Circuit’s continuing conflicted position on strict direct patent infringement liability. In May 2015, the panel on remand reiterated “the well-established fact that direct infringement liability under [section] 271(a) is strict liability.”¹⁶⁹ This, the panel asserted, made it impossible to “stretch” direct patent infringement liability to include joint tortfeasor liability in the manner argued by the patentee as that could result in holding strictly liable a party who had no knowledge that its actions could be combined with another to result in direct patent infringement.¹⁷⁰

Five months later, in August, 2015, the Federal Circuit once again sat *en banc* in *Akamai*, this time vacating the panel decision to hold that an entity is responsible for another’s performance of method steps if it directs or controls that other party’s performance, or if the actors form a joint enterprise.¹⁷¹ Unlike the 2012 *Akamai en banc* decision, the 2015 *en banc* decision was unanimous.¹⁷² The opinion was short and did not refer to “strict liability.” However, the Federal Circuit’s effort to place tight boundaries on the conditions under which an actor could be held directly liable for patent infringement as a result of actions undertaken by another party suggests that the Federal Circuit remains both concerned with the broad net cast by “strict” direct patent infringement liability and committed to cabining the expansive direct patent infringement liability standard set forth by Congress in the Patent Act.

IV. WHY DIRECT PATENT INFRINGEMENT IS NOT A “STRICT LIABILITY” OFFENSE

Vocabulary matters. The manner in which courts, commentators, and practitioners label concepts and causes of action affects how they analyze and classify those concepts and actions. Modern commentators and courts recite with rote certainty that direct

168. *Id.* at 1926 (citing *Global-Tech*, 563 U.S. at 761 n.2).

169. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 786 F.3d 899, 905 (Fed. Cir. 2015).

170. *Id.* Hence, the panel held, the defendant was not liable for direct patent infringement as some of the necessary steps of the method patent were performed by another entity whose actions could not be imputed to the defendant. *Id.* at 915.

171. *Akamai Techs., Inc. v. Limelight Networks, Inc.* 797 F.3d 1020, 1022 (2015) (*en banc*) (per curiam).

172. Three judges did not participate; the other nine were in agreement.

patent infringement is a “strict liability” offense because that label provides familiar—but ultimately inapt—shorthand for referencing liability that is not based in fault or intent.

Even cursory consideration of the implications of the timeline of Figure 1 exposes the inappropriateness of attaching this label to statutory direct patent infringement. In deeming direct patent infringement to follow a “strict liability” standard in 1995, the Federal Circuit implicitly (and likely, inadvertently) adopted theories of tort liability that the drafters of the original patent acts would not have known or considered, introducing an anachronism into patent doctrine. It is this inexact and inappropriate use of a modern common law tort notion—“strict liability”—in the context of a statutory legal concept dating back to 1790 that caused the Federal Circuit to veer off-path and attempt to create incorrect patent infringement doctrine in the 2012 *Akamai en banc*.

“Strict liability” is not a neutral, descriptive term. Rather, the term is replete with connotations of social policy choices and balancing that may be appropriate within the case law context of products liability or abnormally dangerous activities but which are incongruous and inapposite in the statutory context of patent law. In labeling direct patent infringement a “strict liability” offense, the Federal Circuit has infused the gloss of later case law developments into the statutory setting of patent law—and has brought all the historical baggage that the “strict liability” label carries along with it. This has two injurious consequences for patent infringement doctrine.

First, the adoption of the “strict liability” label for direct patent infringement improperly inflates the courts’ role in setting direct patent infringement liability standards. Strict liability reached its fullest flowering in the case law setting of products liability and abnormally dangerous activities. Its adoption in those settings was driven by policy analyses and choices made by the courts and backed by substantial scholarly commentary. The use of the strict liability label in the direct patent infringement setting suggests—incorrectly—that direct patent infringement liability too is a case law construct. Thus, when the 2012 *Akamai en banc* majority felt that strict liability cast too broad a net of liability for multi-actor patent infringement, it also felt free to create a new rule that would narrow the scope of liability for this specific type of direct patent infringement. After all, if the court is applying case law doctrine, rather than statutory language, it can more easily alter that doctrine to reach what is, in its view, the proper outcome.

However, direct patent infringement is, in fact, a statutory construct. Congress made the determination that direct patent

infringement is a liability without fault, intent, or knowledge elements in 1790, and Congress has held fast to that standard through all subsequent patent statute revisions. Whether that liability standard is draconian is not for the courts to determine; the courts' role is merely to apply the language Congress has written, letting the chips fall where they may in terms of the defendant's liability. If the standard is too harsh, or ensnares too many actors, it is up to Congress to fix the problem that its language has created. The Federal Circuit's role is to give effect to Congress's manifested intent, not to revise the statutory standard to fit its own notions of what is fair, correct, or appropriate.

Second, the "strict liability" label improperly shifts the focus of the patent infringement inquiry. When the early courts discussed patent infringement as arising even in the absence of intent or knowledge, this phrasing (properly) concentrated the legal analysis on the language of the Patent Act and the statutory creation of the patent right. The patent right was an absolute one, and anyone who intruded upon it was an infringer.

The adoption of the term "strict liability" for patent infringement, however, shifted the focus from the Patent Act's expansive protection of the patentee's exclusive property interest in its patent right to an inherently value-laden liability inquiry. Modern strict tort liability, with its emphasis on social policy goals,¹⁷³ is a far cry from the writ-based liability norms of the late 1700s. By the time that the Federal Circuit first labeled direct patent infringement a "strict liability" offense in 1995, "strict liability" had become a loaded term in the legal lexicon; its development marked by extensive judicial and scholarly commentary about the policy choices that dictate the acceptance or rejection of this standard, particularly in the products liability setting.

The policy considerations that underlie modern strict tort liability have little or no relevance to direct patent infringement doctrine. As illustrated in Figure 2, the traditional common law areas of strict liability, such as abnormally dangerous activities or products liability, balance the utility of socially desirable behavior by the defendant against the harm caused to the plaintiff.

173. Four rationales are typically offered to justify imposition of strict liability: (1) fairness, (2) economic efficiency, (3) risk-spreading, and (4) deterrence. See, e.g., Oswald, *supra* note 116, at 590–98.

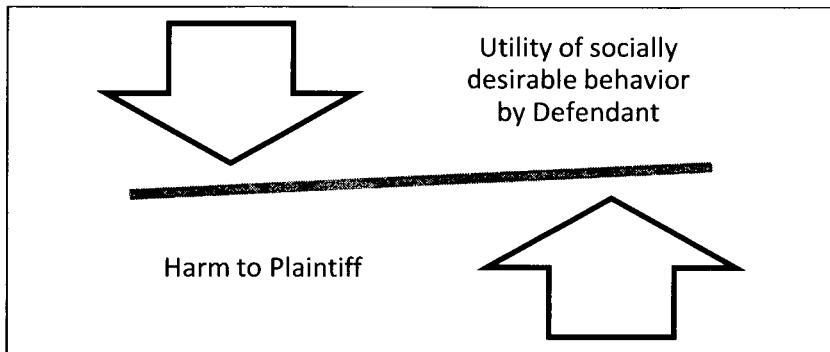


FIGURE 2: BALANCING OF INTERESTS IN TRADITIONAL AREAS OF STRICT LIABILITY

Prosser defined the balancing involved in identifying a strict liability tort thus:

[I]t is conduct which has so much social utility that it will not be treated as wrongful in itself, and will not be prohibited or enjoined in advance, but not so much that the defendant may be allowed to carry it on without liability at the expense of actual damage to his neighbors.¹⁷⁴

As a society, we do not want to ban the behavior involved in a strict liability tort altogether (the selling of products, for example, is a societal good that cannot be easily foregone), but fairness and efficiency dictate that we assign the defendant full liability for any harm incurred by the plaintiff, regardless of the defendant's exercise of care or lack of intent.¹⁷⁵ The defendant can then spread the risk of harm either through charging higher prices or obtaining insurance,¹⁷⁶ or can reduce the risk by refining its behavior.

By contrast, direct patent infringement has no such concept of balancing. Rather, the Patent Act erects a fence around the rights of the patentee to protect against intrusions by a third party. So strong is the property interest at stake—the patent—that an incursion into that interest by the defendant, regardless of intent or fault, is deemed a legal wrong and will automatically give rise to liability.¹⁷⁷ The social

174. PROSSER, *supra* note 29, § 56, at 429.

175. See Oswald, *supra* note 116, at 590–96.

176. *Id.* at 596–97.

177. Subject only to a limited and narrow range of defenses, none of which looks to the social utility of the defendant's conduct. These defenses include, *inter alia*, patent invalidity, inequitable conduct, patent misuse, and experimental use. See DONALD S. CHISUM, CHISUM ON PATENTS § 19.01 (2016).

utility of the defendant's behavior in infringing is simply never part of the equation.

If we jettison the "strict liability" label in the patent infringement context, we are left with the language of the Patent Act, which describes a liability-without-fault standard (but without attaching a label to such liability). Perhaps this standard is too harsh, as the Federal Circuit seems to fear, or perhaps it is a fair mechanism for protecting the limited monopoly created by the Patent Act and granted to the patentee. Regardless, our analysis of the standard of liability for direct patent infringement liability, and any argument for revision of the statutory standard, should be grounded in an understanding of the historical context of patent doctrine as compared to tort doctrine and in a healthy respect for the role of Congress in enacting the Patent Act. That understanding and that respect are obscured by the convenient but inaccurate shorthand label of "strict liability."

V. CONCLUSION

Ultimately, the terminology we use influences how we think about legal doctrine. When the courts label direct patent infringement a "strict liability" offense, they subtly but insidiously invoke policy rationales that are an uneasy and inapt fit in patent doctrine. If we step back and acknowledge explicitly the differences in the historical development of patent and tort doctrine, we can more easily see that direct patent infringement is actually a statutory violation subject to a statutory standard of liability—liability without fault, intent, or knowledge. This liability standard does not carry the social and public policy choices or value judgments inherent in the "strict liability" of common law tort. By avoiding this inapt and malapropos moniker, we are more likely to avoid doctrinally unsound outcomes, such as that reached in the 2012 *Akamai en banc* decision. Discarding the strict liability label for direct patent infringement would reframe the analysis and debate, moving direct patent infringement liability out of a policy framework and into its proper statutory setting. It would also properly bound the judicial role and put Congress firmly in the driver's seat in setting patent infringement liability standards, thus honoring the respective roles of these co-equal branches of government.

