Abstract: Copyright Infringement As Nuisance

In an earlier paper, Patent Infringement As Nuisance (forthcoming in Catholic U. Law Rev.), I argued that the eBay Court’s rejection of a presumption in favor of patent injunctions was consistent with the broader property law landscape, even as understood by theoretical proponents of strong property rules. Where an infringement is incidental to the creation of significant value, the relevant property law doctrines are not trespass or encroachment, but accession and nuisance. The accession doctrine applies where good faith improvement efforts have resulted in value so disproportionately great in comparison with the property taken that forfeiture would be unjust. Nuisance doctrine applies similar principles to nonpossessory use conflicts, withholding strict property rule protection (and thus allowing the acquisition of use privileges by accession) where such protection would disproportionately destroy value. This approach is justified, I argued, because in cases of nuisance it is often impossible for the nuisance-creating enterprise to ascertain what property rights will need to be acquired until after significant productive investments are already made, thus creating the potential for holdup if property rules are later enforced. Moreover, we are justified in qualifying the property rule protection given to patent rights because such rights are themselves taken from the public nonconsensually, in the form of a liability proceeding in which use privileges are appropriated in exchange for information that the ceding parties may or may not value as highly as the privileges lost.

Copyright law exhibits significant differences from patent law that require consideration if the foregoing analysis is to be applied. Unlike patent infringement—to which independent invention is no defense—copyright infringement requires actual copying of a copyrighted work, which in turn implies interaction with some tangible object embodying the protected work. While one might expect this to mean that it is far easier to foresee and avoid copyright than patent infringement, this conclusion turns out to be misleading. The psychically invasive nature of many copyrighted works, coupled with the substantial similarity doctrine’s expansion of copyright scope well beyond literal copying, raises problems of ignorance and indeterminacy similar to those at work in patent and nuisance. Indeed, copyright law contains within it a doctrine bearing remarkable resemblance to nuisance law: fair use. Both the fair use factors of section 106 and the nuisance factors contained in Second Restatement of Torts make a finding that property rights are violated contingent on a fine-grained comparison of the competing uses based on their
nature, desirability, and the extent to which the one actually impedes the other. Furthermore, copyright cases like Stewart v. Abend and Tasini illustrate the compelling weight of the accession principle, in that courts who find infringement nevertheless balk at granting injunctions that would destroy value created by good faith improvers. This paper will seek to trace out the analogies between copyright infringement and nuisance law to shed light on the proper roles of “actual harm” and “good faith” in the decision whether or not grant an injunction against infringers.

Comments: I have a prior engagement on Friday Oct 2, and so would be very grateful if it is possible to have a presentation slot on the 3d. I intend to come to Newark the night of the 2d after the end of a conference at GMU in which I am slated to act as a panel moderator. Thank you for your consideration.