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A Restitution Model for Intellectual Property Remedies

This project explores the extent to which restitution law offers a plausible and viable approach to intellectual property (IP) remedies. Most prominently, we examine the view of the United States' Third Restatement on Restitution[1] that liability in restitution is a unifying principle for enforcement of IP rights. Under the Third Restatement, any benefit that an IP infringer derives from the violation of IP rights is a form of unjust enrichment, and a finding of such unjust enrichment properly triggers the operation of a remedial scheme that, among other things, takes a reticulated approach to questions of relative blameworthiness.[2] Yet the actual structure of remedies schemes under IP laws significantly differs from that presented in the Third Restatement. For example, certain forms of IP remedies, such as the statutory damages that the United States makes available for copyright and design patent infringement, seem mainly alternatives to, rather than variants of, the Third Restatement's remedial approach.

Restitution law is commonly associated with remedies focused on disgorging benefits received by an unjustly enriched party. In certain circumstances, various countries' IP regimes at least partially track this remedial model by relying substantially on a disgorgement remedy under which the infringer pays to the right-holder an amount equal to profits attributable to infringement.[3] Article 13 of the European Union's 2004 directive on the enforcement of IP rights provides that, "[w]hen the judicial authorities [of Member States] set the damages [for infringement of an IP right], "they shall take into account all appropriate aspects, such as … any unfair profits made by

[1] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Am. L. Inst. 2011) [hereinafter THIRD RESTATEMENT].

[2] *Id.* § 42.

[3] *See, e.g.*, Thomas F. Cotter & John M. Golden, *Empirical Studies Relating to Patents—Remedies*, *in* 2 THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (B. Depoorter, P. Menell & D. Schwartz eds., forthcoming) ("[A] form of restitutionary relief, the disgorgement of defendant's profits attributable to [patent] infringement, is common in many countries, though in the U.S. it is available only for the infringement of design patents (as well as, in certain cases, copyright and trademark infringement).").

the infringer."[4] IP laws of individual countries such as Germany and Japan specifically enable holders of multiple forms of IP to obtain damages based on the profits earned by the infringer through infringement.[5] Moreover, other measures for monetary remedies, such as the reasonable royalty measure, can sound significantly in restitution to the extent their value is tied to revenue or profits derived from infringement.[6]

But the overlap between IP remedy schemes and the approach to remedies for unjust enrichment under the Third Restatement is far from complete. As we discuss in a published article, *A Restitution Perspective on Reasonable Royalties*,[7] the Third Restatement outlines a reticulated approach to monetary remedies under which disgorgement of profits is only one potential measure.[8] Although not arguing that the United States should revive a traditional disgorgement-of-profits remedy for patent infringement, our earlier article indicates how aspects of the legal architecture of restitution's approach to monetary relief might improve the assessment of reasonable royalties under United States' patent law. In the article, we conclude that the law of restitution suggests at least three specific ways by which the assessment of reasonable royalties might better serve social aims: (1) use of more context-sensitive allocation of burdens of proof and production; (2) incorporation of at least partial attention to the cost and social value of innovation along with attention to an infringer's revenues, profits, or other benefits from infringement; and (3) deployment of different damages measures in a way that distinguishes between levels of relative responsibility or fault.

The project described here expands upon the concerns of our prior article by looking to remedies under IP regimes more broadly, both in the United States and in other countries. Consistent with our earlier, narrower findings, our current impression is that IP remedies in the United States and elsewhere commonly lack much of the operational reticulation characteristic of remedies under the Third Restatement. Along with (1) the Third Restatement's intriguing suggestion that restitution provides a general theory for IP liability and (2) our own perception that restitution and IP laws share interests in promoting socially desirable behavior and discouraging

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[4] Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 16, 23.

[5] *See, e.g.*, THOMAS F. COTTER, COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS 271–72 & n.191 (noting how "cases in which [German] courts have awarded the defendant's profits appear to have increased in the wake of [a decision of the year 2000] involving infringement of a *Geschmacksmuster* [registered design], whose principles "have since been applied to patent and copyright matters"); *id.* at 323 (noting that statutory law in Japan establishes "the infringer's profits" as the presumptive measure "for compensatory damages" for patent infringement); DISGORGEMENT OF PROFITS: GAIN-BASED REMEDIES THROUGHOUT THE WORLD (Ewoud Hondius & André Janssen eds., 2015).

[6] *See* THIRD RESTATEMENT, *supra* note 1, § 42 cmt. f ("[R]estitution by use value survives in the current [United States'] Patent Act, which authorizes recovery of a 'reasonable royalty' as a form of statutory damages for infringement.").

[7] John M. Golden & Karen E. Sandrik, *A Restitution Perspective on Reasonable Royalties*, 36 REV. LITIG. 335 (2017).

[8] *Id.* at 362–63.

socially undesirable behavior, this disjunction between international IP schemes and the Third Restatement's approach has motivated us to undertake this further, broader project. Countries whose approaches we plan to consider include not only common law jurisdictions such as the United Kingdom, Canada, and Australia, but also countries such as Chile, Germany, and Japan. International perspectives on restitution as well as on intellectual property are expected to figure in the project, which, as a basis for discussion of restitution and IP remedies, will examine how different theories of restitution relate to moral and economic theories of intellectual property. Restitution law and theory might ultimately provide instruction not only on how to improve IP remedies, but also on how IP laws can exploit and encourage synergies between their at least arguable moral and economic foundations. Attention to restitution as a potential model cannot be expected to solve all challenges in IP design and justification, but we currently hold out hope that such attention can point out ways to improve intellectual property's moral legitimacy as well as its economic performance.