

## IP ACCIDENTS

In the twenty-first century, it has become easy to break IP law accidentally. The challenges presented by orphan works, independent invention or IP trolls are merely examples of a much more fundamental problem: IP accidents. This book argues that IP law ought to govern accidental infringement much like tort law governs other types of accidents. In particular, the accidental infringer ought to be liable in IP law only when their conduct was negligent. The current strict liability approach to IP infringement was appropriate in the nineteenth century, when IP accidents were far less frequent. But in the Information Age, where accidents are increasingly common, efficiency, equity, and fairness support the reform of IP to a negligence regime. Patrick R. Goold provides the most coherent explanation of how property and tort interact within the field of IP, contributing to a clearer understanding of property and tort law and private law generally.

Patrick R. Goold is Senior Lecturer at The City Law School; City, University of London. He is a legal philosopher with interests in IP, property, and private law theory.

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# IP Accidents

NEGLIGENCE LIABILITY IN INTELLECTUAL PROPERTY

**PATRICK R. GOOLD**

The City Law School; City, University of London



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## Acknowledgements

In 2010, as a PhD candidate in Germany, I read a fascinating article entitled ‘Foreseeability and Copyright Incentives’ by Shyamkrishna Balganesh.<sup>1</sup> That article (a modern classic) argued that copyright law should enable authors to control uses of their works which were ‘reasonably foreseeable’ at the time of the work’s creation. In essence, the article showed how copyright law could be improved by incorporating an idea that has long been routine within tort law (the idea that rights and responsibilities should be bounded by the concept of ‘foreseeability’). Reading the article was a formative experience for a young IP scholar. The article had the hallmarks of great scholarship: it said something new, something useful, and something that was not immediately obvious to those working in the field. Above all else, the article was highly thought-provoking. In particular, it raised the question: what other lessons could IP law learn from the field of tort law? This book is the culmination of ten years working on that question.

While working on this project, I have been helped immeasurably by an amazing group of scholars (too many to list in full here). Pamela Samuelson, Robert Merges, and Dan Burk provided me with my ‘big break’ by inviting me to the University of California as a research fellow. In Berkeley, the ideas for this book began to take shape. I am thankful to Pam, Robert, and Dan for putting faith in a junior scholar. I subsequently moved to IIT Chicago-Kent where I learned the ropes of the academic life. The people associated with Chicago-Kent (past and present) – Graeme Dinwoodie, Edward Lee, Christopher Buccafusco, and David Schwartz – have provided a constant source of sound and wise advice for which I am ever grateful. After two good years in Chicago, I was invited to continue my work at Harvard Law School by Henry Smith and John Goldberg. My time working with John and Henry on the Project of the Foundations of Private Law was the most intellectually enjoyable and engaging period of my career. But perhaps the most direct and significant intellectual debt I owe is to Oren Bracha. I first reached out to Oren as a PhD student to discuss copyright history. Since then, Oren has provided

<sup>1</sup> (2009) 122 Harv L Rev 1569.

advice, friendly critiques, and helpful nudges in the right direction, all without expecting anything in return. Parts of the current monograph come from the ‘Copyright Accidents’ article which Oren and I co-wrote.

Working on this project has taken me away from the UK, to Germany, to California, to Illinois, to Massachusetts, and then finally back to the UK. Moving time zones five times in a decade presents significant personal challenges. I could not have completed this journey without the unwavering love and support of three people: my parents, Michael and Jane Goold, and my partner, Lisa Dresser. It is to them that this book is dedicated.



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Patent Act, 5 Stat 117 (1836) (USA)  
Patent Act, 5 Stat 543 (1842) (USA)  
Patent Act, 12 Stat 246 (1861) (USA)  
Patents Act 1977 c 37 (UK)  
Sculpture Copyright Act 1814, 54 Geo III, c 56 (UK)  
Statute of Anne 1709, 8 Anne, c 19 (UK)

## Abbreviations

AC Law Reports:	Appeal Cases (UK)
Akron L Rev	Akron Law Review
American Econ Rev	American Economic Review
Ariz L Rev	Arizona L Rev
Atk	Atkyns' Reports (UK)
BC L Rev	Boston College Law Review
Berkeley Tech L J	Berkeley Technology Law Journal
BU L Rev	Boston University Law Review
CA	Court of Appeal (UK)
CA NY	New York Court of Appeals (USA)
Cal L Rev	California Law Review
Can J L & Juris	Canadian Journal of Law & Jurisprudence
Cardozo Arts & Ent L J	Cardozo Arts and Entertainment Law Journal
CB	Common Bench Reports (UK)
CCD Ill	Circuit Court District of Illinois (USA)
CCD Mass	Circuit Court District of Massachusetts (USA)
CCD Ohio	Circuit Court District of Ohio (USA)
CCD NJ	Circuit Court District of New Jersey (USA)
CCD Va	Circuit Court District of Virginia (USA)
CCED Pa	Circuit Court Eastern District of Pennsylvania (USA)
CCSD Ala	Circuit Court Southern District of Alabama (USA)
CCSD NY	Circuit Court Southern District of New York (USA)
CD Cal	United States District Court, Central District of California (USA)
Ch	Court of Chancery (UK)
Ch R Law Reports	Chancery Division (UK)

Cir	United States Courts of Appeals (USA)
Colum J L & Arts	Columbia Journal of Law & the Arts
Colum L Rev	Columbia Law Review
Cornell L Rev	Cornell Law Review
CP	Court of Common Pleas (UK)
D Mass	United States District Court, District of Massachusetts (USA)
D Nev	United States District Court, District of Nevada (USA)
Duke L J	Duke Law Journal
ECDR	European Copyright and Design Reports (UK)
ED Va	United States District Court, Eastern District of Virginia (USA)
Emory L J	Emory Law Journal
ER	All England Law Reports (UK)
EWHC	England and Wales High Court (UK)
F	Federal Reporter (USA)
F Cas	Federal Cases (USA)
F Supp	Federal Supplement (USA)
Fed Cir	United States Court of Appeals for the Federal Circuit (USA)
Florida L Rev	Florida Law Review
Florida L Rev F	Florida Law Review Forum
Fordham L Rev	Fordham Law Review
FSR Fleet Street Reports:	Cases on Intellectual Property Law (UK)
Gen Ct Md	General Court of Maryland (USA)
Georgetown L J	Georgetown Law Journal
Georgia L Rev	Georgia Law Review
H & McH	Maryland Reports (USA)
Harv J L & Tech	Harvard Journal Law & Technology
Harv Law Rev	Harvard Law Review
HL	House of Lords (UK)
Houston L Rev	Houston Law Review
Indiana L J	Indiana Law Journal
Intl J Comm	International Journal of Communications
IPEC	Intellectual Property Enterprise Court (UK)
J Econ & Manage S	Journal of Economics & Management Strategy
J L & Econ	Journal of Law and Economics
J Legal Analysis	Journal of Legal Analysis
J Legal Stud	Journal of Legal Studies
J Product Innov Manage	Journal of Product Innovation Management
Lewis & Clark L Rev	Lewis & Clark Law Review

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LQ Rev	Law Quarterly Review
Marq IP L Rev	Marquette Intellectual Property Law Review
Mass	Early Massachusetts Reports (USA)
Mer	Merivale's Chancery Reports
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
Mo L Rev	Missouri Law Review
NC L Rev	North Carolina Law Review
ND Ill	United States District Court, Northern District of Illinois (USA)
ND Cal	United States District Court, Northern District of California (USA)
Notre Dame L Rev	Notre Dame Law Review
Nw U L Rev	Northwestern University Law Review
NY	New York Official Reports (USA)
NYU L Rev	New York University Law Review
P	Pacific Reporter (USA)
Pat	Chancery Division (Patents Court)
PC	Privy Council (UK)
Phil & Pub Affairs	Philosophy & Public Affairs
Proceedings American Phil Soc	Proceedings of the American Philosophical Society
QB High Court of Justice:	Queen's Bench Division (UK)
RPC	Reports of Patent, Design and Trade Mark Cases (UK)
Rutgers L Rev	Rutgers Law Review
S Ct	Supreme Court Reporter (USA)
SCC	Supreme Court of Canada (Canada)
SC Wash	Supreme Court of Washington (USA)
SD NY	United States District Court, Southern District of New York (USA)
Sim	Simons' Vice Chancellor's Reports
SJC Mass	Supreme Judicial Court of Massachusetts (USA)
Stan L Rev	Stanford Law Review
Tex L Rev	Texas Law Review
Theoretical Inquiries L	Theoretical Inquiries in Law
Tulane L Rev	Tulane Law Review
U Penn L Rev	University of Pennsylvania Law Review
UC Davis L Rev	University of California, Davis Law Review
UKSC	Supreme Court of the United Kingdom (UK)
US	United States Reports

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Va L Rev	Virginia Law Review
Vand J Ent & Tech L	Vanderbilt Journal of Entertainment & Technology Law
Vand L Rev	Vanderbilt Law Review
Wash	Washington Reports
WL	Westlaw Case Number
Wm and Mary L Rev	William and Mary Law Review
Yale J L & Tech	Yale Journal of Law & Technology
Yale L J	Yale Law Journal