

## A RESTITUTION PERSPECTIVE ON REASONABLE ROYALTIES

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**ABSTRACT**—*The law of restitution provides useful lessons for how courts can approach reasonable royalty assessments in patent law. The law of restitution uses a reticulated set of damages measures and a corresponding set of graded levels of fault or responsibility to award monetary relief in a context-sensitive manner attentive both to the underlying purposes of relevant law and to practical difficulties of proof. As a backstop to other damages measures, reasonable royalty damages act, in Judge Learned Hand’s words, as “a device in aid of justice.” Like restitution awards, reasonable royalty awards might be assessed in a manner that reflects at least some evaluation of parties’ relative fault, acknowledges constraints on reasonably available economic evidence, and pays at least periodic attention to factors suggested by the law’s policy justifications. In the case of patent law, such factors include reasonable costs of innovation, an invention’s social value, and an invention’s technical significance, all apparently relevant to the extent to which patent law promotes technological progress.*

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## INTRODUCTION

Patent law commonly confronts problems of uncertainty and technical difficulty. Some of these questions, such as those centered on the definition and implementation of patentability standards of subject-matter eligibility, enablement, and nonobviousness, are relatively unique to patents. But recent debates over patent-infringement remedies reflect fundamental issues with respect to the enforcement and valuation of rights—or of injury from the violation of those rights—that courts have encountered in a wide variety of contexts. Consequently, remedies debates offer substantial opportunities for patent law to draw instruction from other legal fields.

Questions about how to assess reasonable royalties for patent infringement offer particularly fruitful opportunities for cross-pollination.<sup>1</sup> The law of restitution is an especially good candidate for comparative study. Decades ago, U.S. patent law shed a traditional disgorgement remedy commonly associated with restitution. Although we are not looking to the law of restitution to argue for this remedy’s revival, we are looking to see what the legal architecture of restitution’s approach to monetary relief suggests about ways to improve reasonable royalty analysis within U.S. patent law’s current remedies structure.

There is reason to hope that restitution law might have much to teach. Most prominently, there is the practical fact that, despite patent law’s formal elimination of a disgorgement remedy, its retained reasonable royalty remedy has long operated in a quasi-disgorgement fashion by posing the question of what percentage of an infringer’s revenue a patentee should receive. Because the restitution law itself does not generally demand full disgorgement of a wrongdoer’s profits, the partial-disgorgement character of many reasonable royalty awards directly overlaps with the nature of relief that restitution often affords.

As one would expect from this overlap in practical content, restitution law has substantial experience in addressing issues that also appear in the assessment of reasonable royalties. These issues include

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<sup>1</sup> See, e.g., John M. Golden, *Reasonable Certainty in Contract and Patent Damages*, 30 HARV. J. L. & TECH. (forthcoming) (“Contract law’s reasonable certainty requirement provides helpful instruction for how courts can regulate proof of reasonable royalty damages in patent cases.”).

problems of reasonably apportioning value among multiple contributions to an overall activity or outcome, assigning burdens of production of production and proof with respect to valuation and apportionment, and assuring consistency of remedies with statutory law or other expressions of public policy. In contrast with the often relatively blunderbuss approach of patent law, the law of restitution has responded to such problems in at least three context-sensitive ways: (1) by developing an array of alternative measures for monetary relief, (2) by tying deployment of these measures to similarly reticulated classifications of parties' relative responsibility, and (3) by showing sensitivity to practicalities of proof and background policy concerns. This Article suggests that, in relation to reasonable royalties, patent law can learn much from the law of restitution's comparatively precise yet flexible approach.

Part I provides an introduction to patent remedies and, more specifically, to reasonable royalty damages as an option within patent law's standard remedial suite. Part II provides a primer on the law of restitution and then discusses the vision of intellectual property remedies specifically embraced by the Restatement (Third) of Restitution and Unjust Enrichment. Part II concludes by examining in detail the law of restitution's multi-tiered approach to monetary relief. Part III considers how aspects of this reticulated approach might translate to the award of reasonable royalties in patent law. The crucial point is that, in accordance with restitution's example, patent law might take greater account of cost, social value, and relative responsibility or fault in assessing reasonable royalties. Such lessons can enhance patent law's capacity to advance its public purposes by better enabling it to reward meritorious innovators, to discourage bad-faith infringement, and to limit undue chilling of socially desirable follow-on work.

## **I. REASONABLE ROYALTIES IN PATENT LAW**

In little over a decade, the law of patent-infringement remedies has changed from a relatively neglected backwater into a maelstrom of controversy frequently at the center of efforts at patent reform.<sup>2</sup> In recent years, concern with reasonable royalty damages has been at the forefront of such debates. This Part explains the role of reasonable royalties within the overall scheme of patent remedies, discusses the historical elimination of

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<sup>2</sup> See John M. Golden, *Principles for Patent Remedies*, 88 TEX. L. REV. 505, 506 (2010) ("Once a joint domain of inertia and arcana, questions of patent remedies now generate heated public debate.").

U.S. patent law’s traditional disgorgement remedy, and limns key aspects of current struggles in the law of reasonable royalties.

#### A. REASONABLE ROYALTIES IN THE SUITE OF PATENT REMEDIES

The fundamental remedies in U.S. patent law are (1) injunctions “to prevent the violation of” patent rights<sup>3</sup> and (2) damages “adequate to compensate for [any] infringement.”<sup>4</sup> Section 283 of the Patent Act empowers courts to grant such injunctions “in accordance with the principles of equity,” and § 284 of the Act mandates that courts award damages “in no event less than a reasonable royalty for the use made of the invention by the infringer.”<sup>5</sup> Courts have inferred a capacity to grant another form of relief when they deny a permanent injunction but feel that a risk of ongoing infringement justifies forward-looking monetary relief.<sup>6</sup> Avoiding calling this forward-looking relief a compulsory license, courts have dubbed it an “ongoing royalty,”<sup>7</sup> thereby signaling a substantial tie between its assessment and the calculus for a reasonable royalty for past infringement, although the exact relation between the two remains a work in progress.<sup>8</sup>

There are additional remedies available under the Act, either as a direct result of the Act’s express terms or as a result of judicial interpretation. Significantly for concerns of justice, equity, and the public interest, § 284 also provides for enhanced damages by stating that a “court may increase the damages up to three times the amount [of damages

<sup>3</sup> 35 U.S.C. § 283.

<sup>4</sup> *Id.* § 284.

<sup>5</sup> *Id.*

<sup>6</sup> Thomas F. Cotter & John M. Golden, *Empirical Studies Relating to Patents—Remedies*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (Peter Menell, David Schwartz & Ben Depoorter eds., forthcoming) (“The Federal Circuit has recognized that, in lieu of a permanent injunction, a trial court may award an ‘ongoing royalty’ for continuing infringement . . .”).

<sup>7</sup> *See, e.g.*, Paice LLC v. Toyota Motor Corp., 504 F.3d 1293, 1314 (Fed. Cir. 2007) (“Under some circumstances, awarding an ongoing royalty for patent infringement in lieu of an injunction may be appropriate.”).

<sup>8</sup> *See* Peter Lee, *The Accession Insight and Patent Infringement Damages*, 110 MICH. L. REV. 175, 232 (2011) (“As a practical matter, courts are likely to turn to the familiar practice of calculating reasonable royalties for past infringement when determining ongoing royalties.”); William F Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 390 tab.1 (2016) (generally recommending ongoing royalties at the “same rate as past damages”).

otherwise] found or assessed.”<sup>9</sup> The statute does not elaborate on when such damages should be awarded, but courts have commonly associated the availability of such punitive relief with a finding that infringement was willful and thus in some sense especially wrongful.<sup>10</sup> Likewise, the Act provides for the possibility of a court awarding “reasonable attorney fees to the prevailing party,”<sup>11</sup> but the Act restricts this possibility to “exceptional cases”<sup>12</sup> and thereby keeps at center stage awards of injunctions, damages, and ongoing royalties as alternatives to injunctions.

Hence, in the current patent regime, reasonable royalty damages have a vital role as a floor for one of the two most central forms of remedies under the Patent Act. Moreover, the importance of this role has been both highlighted and augmented by recent developments, two of which merit immediate attention.

First, the 2006 decision of the U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*<sup>13</sup> effectively restricted the previously presumptive availability of permanent injunctions to patent holders who prove a defendant’s liability for infringement.<sup>14</sup> In turn, new limits on injunctive relief have given monetary relief greater relative weight within patent law’s remedial scheme. If injunctive relief is unavailable, monetary remedies become essentially all that courts offer a patent owner to back up formal legal patent rights. Hashing out the value of these rights in court, as embodied in an award of lost profits, a reasonable royalty, or an ongoing royalty, then becomes much more crucial to the effective functioning of the patent regime.

A second development has focused attention on reasonable royalty damages specifically, as opposed to monetary remedies generally. This development reflects changes in technology markets and, in particular, a much greater emphasis on the monetization of patent rights, rather than

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<sup>9</sup> 35 U.S.C. § 284.

<sup>10</sup> See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc) (citing precedent associating enhanced damages with “willful or bad faith infringement”).

<sup>11</sup> 35 U.S.C. § 285.

<sup>12</sup> *Id.*

<sup>13</sup> 547 U.S. 388 (2006).

<sup>14</sup> See Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 204, 212–18 (2012) (discussing *eBay*’s responsiveness to concerns that permanent injunctions for patent infringement had become too readily available and its calling into questions prior presumptions in favor of injunctive relief).

their less directly monetized use as tools to deter potential competitors or as bargaining chips for purposes of cross-licensing or patent-infringement-suit deterrence.<sup>15</sup> Monetization has been embraced both by traditional product or service companies that have built patent portfolios reaching beyond core business needs and also by more specialized forms of so-called “patent aggregators” or “patent assertion entities” whose core—and commonly sole—business is that of acquiring and licensing or otherwise enforcing patent rights.<sup>16</sup> For patent assertion entities and, more generally, monetizers enforcing patents far outside the scope of any more traditional business activities, there is generally no substantial option of damages based on lost profits separate from licensing fees not paid by the infringer. Moreover, in the wake of *eBay*, such patent holders’ prospects for obtaining an injunction are frequently bleak.<sup>17</sup> Thus, the single fundamental remedy, essentially the only likely remedy of any substantial import, for these patentees is often that of reasonable royalty damages. In light of the increased prominence of such monetizing patent holders in the U.S. patent landscape, reasonable royalty damages have become more important than ever to how the patent regime operates.

## B. RISE OF THE REASONABLE ROYALTY REMEDY

The rise of reasonable royalty damages to its current starring role in the patent system’s operation might be understood to constitute an upending of the traditional hierarchy of patent remedies. Until *eBay*, damages remedies for patent infringement were commonly secondary to injunctive relief both in importance to individual litigants and in the timing of activity relating to them within patent litigation. This was perhaps particularly true

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<sup>15</sup> Cf. John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 598 (2013) (discussing “a past tradition of relative restraint in patent rights’ enforcement and acquisition”).

<sup>16</sup> See, e.g., Robin Feldman, *Intellectual Property Wrongs*, 18 STAN. J.L. BUS. & FIN. 250, 266 (2013) (observing that “[s]ome operating companies have entered the patent monetization game by either creating subsidiaries to manage their intellectual property portfolios or transferring their intellectual property to third parties”); Amy L. Landers, *Liquid Patents*, 84 DENV. U. L. REV. 199, 202 (2006) (“Recognizing that the patent right can be monetized into licensing fees and damages in an action for patent infringement, some entities have undertaken formalized programs to gather or acquire critical patents in particular fields.”).

<sup>17</sup> See Cotter & Golden, *supra* note 6 (observing that empirical studies have indicated “that a patent owner’s status as a patent assertion entity was substantially associated with denial of injunctive relief”); Karen E. Sandrik, *Reframing Patent Remedies*, 67 U. MIAMI L. REV. 95, 97 (2012) (“Case law in the last five years has established a near categorical rule that [nonpracticing entities] cannot obtain injunctive relief.”).

of reasonable royalty damages, for which there were relatively few reported decisions by the courts.<sup>18</sup> With the threat of an injunction in prospect, patent holders and accused infringers could frequently look forward to working out any funds to be exchanged as part of the process of negotiating a license to forestall or defuse either the threat or the court-issued reality of injunctive relief. The ability to bifurcate trials into liability and remedies phases<sup>19</sup> and to take an appeal before damages were assessed<sup>20</sup> could further put off court proceedings—and even preparations for court proceedings—specifically relating to the assessment of monetary relief. As indicated in section I.A, *eBay* has made court-awarded damages or their prospect more central to patent litigation by lowering the likelihood of injunctive relief and, for substantial numbers of cases, removing the prospect of injunctive relief all but entirely.<sup>21</sup> Thus, part of the rise of reasonable royalties into prominence is a very recent story about renewed emphasis on monetary relief in general.

A longer story about the rise of reasonable royalty damages involves their emergence from essential nonexistence to an alternative measure of damages that could enable substantial compensation when other measures of damages were insufficiently proven or otherwise unavailable. Through the late nineteenth century, the dominant measures of patent-infringement damages in actions at law were royalties based on a pre-established royalty rate, lost profits from “lost sales or diminished revenues” as a result of competition from an infringer, or nominal damages,<sup>22</sup> the last of which were of an amount technically within a jury’s discretion but generally required to be fundamentally inconsequential, as with the apparently conventional

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<sup>18</sup> Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2030 (2007) (reporting the gathering of “a surprisingly small number of cases—only fifty-eight”—through the “collect[ion of] all cases reported in Westlaw from 1982 through mid-2005 that actually awarded reasonable royalties to patentees”).

<sup>19</sup> Cf. Ronald J. Schutz & Jonathan D. Goins, *Case Management Issues in Patent Litigation*, 5 SEDONA CONF. J. 1, 9 (2004) (“In most cases, damages should be severed f[ro]m other issues to simplify the task of the fact finder.”).

<sup>20</sup> 28 U.S.C. § 1292(c)(2) (providing for “an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting”); see also V. Ajay Singh, Note, *Interlocutory Appeals in Patent Cases Under 28 U.S.C. § 1292(c)(2): Are They Still Justified and Are They Implemented Correctly?*, 55 DUKE L.J. 179, 184 (2005) (observing that 28 U.S.C. § 1292(c)(2) enables an interlocutory appeal after “the patent has been found to be valid and infringed and . . . all that remains is to determine the amount of damages to be awarded”).

<sup>21</sup> See *supra* note 6 and accompanying text.

<sup>22</sup> 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.02[2] (2016).

nominal damages award of six cents.<sup>23</sup> In equity, a patent holder generally did not have access to these measures of monetary remedies available at law, but instead had recourse to the remedy of disgorgement of an infringer’s relevant profits—that is, the portion of those profits properly attributable to the infringement.<sup>24</sup>

But various courts found the above-described set of patent damages measures to be inadequate. Restriction to these measures could lead to what were perceived to be insufficient rewards, perhaps no more than nominal damages even though substantial commercial harm had occurred. Such outcomes could result because demands for proving such measures as lost profits or an established royalty rate were strict<sup>25</sup> and because disgorgement of infringer profits had its own problems of proof and was only available if equity jurisdiction were separately established.<sup>26</sup> Consequently, some courts experimented with allowing the award of damages based on “general evidence” “to get at a fair measure of damages.”<sup>27</sup> Such general evidence could include evidence of “the utility and advantage of the invention over the old modes or devices” and evidence of “the extent of the use [of the invention] by the infringer.”<sup>28</sup> The U.S. Supreme Court ultimately asserted that, through such evidence, a jury could determine “the loss to the patentee

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<sup>23</sup> See *id.*; 3 WILLIAM C. ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS § 1052, at 320 (1890).

<sup>24</sup> See 7 CHISUM, *supra* note 22, § 20.02[3] (observing that the U.S. Supreme Court established early on that the patent owner could only recover profits “attributable to the patented invention”).

<sup>25</sup> See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 49 (2d Cir. 1939) (L. Hand, J.) (observing that “most patentees used to be wrecked” by a demand that the patentee show what portion of an infringer’s profits were attributable to the infringement); 7 CHISUM, *supra* note 22, § 20.02[2] (chronicling the emergence of reasonable royalty damages in U.S. case law); (“Reasonable royalty damages arose in the common law as a way to award some damages to patentees who could not sufficiently prove their damages or the infringer’s profits, rather than give such patentees only nominal damages upon proof of infringement.”); Oskar Liivak, *When Nominal Is Reasonable: Damages for the Unpracticed Patent*, 56 B.C. L. REV. 1031, 1046–47 (2015) (observing that courts looked for ways to alleviate the harshness of pre-existing restrictions on damages); Note, *Recovery in Patent Infringement Suits*, 60 COLUM. L. REV. 840, 848 (1960) (“[T]he inequity of depriving a patent owner of compensation for the misappropriation of his exclusive rights was remedied by the judicial development of an award based on a reasonable royalty.”).

<sup>26</sup> See 7 CHISUM, *supra* note 22, § 20.02[1][e] (discussing a holding of the U.S. Supreme Court “that a patent owner could not file a suit in equity after expiration of the patent to collect the defendant’s profits earned prior to expiration”).

<sup>27</sup> *Suffolk Co. v. Hayden*, 70 U.S. (3 Wall.) 315, 320 (1865).

<sup>28</sup> *Id.*

or owner, by the piracy, instead of the purchase of the use of the invention.”<sup>29</sup>

Thus, reasonable royalty damages first arose as a form of residual remedy that could enable more than nominal monetary relief—and some greater approximation of at least minimal justice—when other, presumably preferable measures of damages, failed.<sup>30</sup> In this sense, reasonable royalty damages served as a sort of stopgap, permitting both some “fudging” of otherwise applicable strictures for providing monetary relief and at the same time giving judges power to correct potentially errant factfinders (e.g., a trial judge or jury) through reliance on the ultimately legal nature of an assessment of reasonableness.<sup>31</sup> Judge Learned Hand described this originally residual role of reasonable royalty damages as follows:

The whole notion of a reasonable royalty is a device in aid of justice, by which that which is really incalculable shall be approximated, rather than that the patentee, who has suffered an indubitable wrong, shall be dismissed with empty hands.<sup>32</sup>

Now, what Hand characterized as “a device in aid of justice” is likely to be not a merely residual backstop but instead the only measure of substantial relief effectively available in a large class of cases in which patent assertion entities or other nonpracticing patent holders allege patent infringement.<sup>33</sup> This shift of reasonable royalty damages to the foreground

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<sup>29</sup> *Id.*

<sup>30</sup> Golden, *supra* note 1; *see also* Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152, (6th Cir. 1978) (describing “the ‘reasonable royalty’ device” as “[c]reated in an effort to ‘compensate’ when profits are not provable”). Whether, problems of proof aside, the only available reasonable royalty is sometimes a merely nominal one is a currently debated question. Daniel Harris Brean, *Ending Unreasonable Royalties: Why Nominal Damages Are Adequate to Compensate Patent Assertion Entities for Infringement*, 39 VT. L. REV. 867, 923 (2015) (concluding that courts should award no more than nominal damages “[w]here actual harm cannot be shown”); Liivak, *supra* note 25, at 1034 (contending “that a nominal reasonable royalty is proper where the patentee has not undertaken any efforts to commercialize the invention and the patent is asserted against an independent inventor”); Nathaniel C. Love, Note, *Nominal Reasonable Royalties for Patent Infringement*, 75 U. CHI. L. REV. 1749, 1772 (2008) (“When noninfringing alternatives are available, zero (or nominal) reasonable royalty awards in patent infringement suits are supported by the patent statutes and Federal Circuit jurisprudence.”).

<sup>31</sup> *Cf.* 7 CHISUM, *supra* note 22, § 20.02[4] (discussing the elimination of the disgorgement remedy and the role of reasonable royalties).

<sup>32</sup> *Cincinnati Car Co. v. N.Y. Rapid Transit Corp.*, 66 F.2d 592, 595 (2d Cir. 1933).

<sup>33</sup> *See supra* note 6 and accompanying text.

of patent law practice has predictably placed greater pressure on courts to rationalize and limit their application, a phenomenon described in section I.D below.

### C. FALL OF PATENT LAW'S DISGORGEMENT REMEDY

Before outlining present concerns with the understanding and implementation of reasonable royalty damages, it is important to highlight one further part of the history of their rise—namely, the demise in the United States of the traditional remedy of disgorgement of an infringer's relevant profits. Almost necessarily, elimination of this restitution remedy made the availability of reasonable royalties more vital to patent law's overall remedial scheme. Likewise, this historical development sheds light, albeit a somewhat ambiguous light, on the extent to which restitution principles might and should productively inform the modern deployment of reasonable royalty damages.

The elimination of the disgorgement remedy in U.S. patent law traces back to a 1946 statute amending the U.S. patent law by specifying that, in a patent-infringement suit, a prevailing patent holder “shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor.”<sup>34</sup> This statutory language notably omitted any explicit reference to a monetary remedy based on the infringer's profits. A House committee report arguably shed some light on this omission by indicating that the new statutory language's eschewing of prior statutory reference to accounting for profits did “not preclude the recovery of profits as an element of general damages.”<sup>35</sup> Instead, according to the report, the new statutory language “empower[ed] equity courts to assess general damages irrespective of profits” and thus to avoid the delay and expense of technical processes of assessing infringer profits and then engaging in “apportionment”—attributing a fraction of those profits to the infringement.<sup>36</sup> A Senate committee report adopted in full the House committee's characterization of this amendment.<sup>37</sup>

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<sup>34</sup> Act of August 1, 1946, Pub. L. No. 587, 60 Stat. 778, 778 (1946).

<sup>35</sup> H.R. Rep. No. 79-1587, at 1-2 (1946).

<sup>36</sup> *Id.* at 2.

<sup>37</sup> S. Rep. No. 79-1503, at 2 (1946) (adopting the House committee report “as the report of the Senate Committee on Patents”).

Courts split on whether the 1946 amendment abrogated the traditional remedy of disgorgement of an infringer's profits.<sup>38</sup> In 1964, a plurality opinion of four U.S. Supreme Court justices effectively resolved the controversy by (1) emphasizing a distinction between the recovery of "profits" and the recovery of "damages," and (2) concluding that "[t]he purpose of the [1946] change was precisely to eliminate the recovery of profits as such and allow recovery of damages only."<sup>39</sup> Lower courts subsequently fell into line,<sup>40</sup> and a majority of the Supreme Court ultimately embraced the 1964 plurality's view in a 1983 opinion.<sup>41</sup>

One might imagine an argument that the elimination from U.S. patent law of the classic restitution remedy of disgorgement suggests that the law of restitution is now essentially forbidden ground in thinking about how best to apply the present Patent Act. But the current exclusion of a straightforward disgorgement remedy seems more properly viewed as having more limited significance. As interpreted, the 1946 amendment by Congress requires that those advocating restoration of a pure disgorgement remedy call for congressional action.<sup>42</sup> But the 1946 amendment does not prohibit courts from drawing instruction for reasonable royalty assessments from the handling of similar concerns in the law of restitution. Indeed, courts have explicitly recognized that the magnitude of an infringer's profits can inform a court's assessment of the proper size of a damages award, including a reasonable royalty award.<sup>43</sup> Permitting infringer's profits to

<sup>38</sup> 7 CHISUM, *supra* note 22, § 20.02[4][c].

<sup>39</sup> *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 505 (1964).

<sup>40</sup> 7 CHISUM, *supra* note 22, § 20.02[4][c]; Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 LEWIS & CLARK L. REV. 563, 665 (2010) (observing that "subsequent courts" treated the plurality's "determination regarding the elimination of the profit remedy as authoritative").

<sup>41</sup> *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 (1983) ("In 1946 Congress excluded consideration of the infringer's gain by eliminating the recovery of his profits.").

<sup>42</sup> *See* Roberts, *supra* note 40, at 685 (contending that "Congress should reform the Patent Act to reauthorize a restitutionary disgorgement remedy"); *cf.* *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) (stating that "*stare decisis* carries enhanced force when a decision ... interprets a statute").

<sup>43</sup> *See, e.g.*, *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 655 (Fed. Cir. 1985) ("[U]nder proper circumstances, an infringer's profits may be considered in establishing a patent holder's general damages."); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 243 F. Supp. 500, 530 (S.D.N.Y. 1965) (observing that "the profits made by an infringer are frequently taken into account in the fixing of a reasonable royalty"); 7 CHISUM, *supra* note 22, § 20.02[4][c] (discussing cases); F. Scott Kieff & Anne Layne-Farrar, 9 J. COMPETITION L. & ECON. 1091, 1110 (2014) (describing as a "long-accepted principl[e]" the notion that "infringer's profits may be at least relevant to a damages calculation").

inform reasonable royalty awards naturally enables those awards to implement a form of partial disgorgement.<sup>44</sup> Among the fifteen *Georgia-Pacific* factors commonly cited as potential bases for a court's assessment of reasonable royalty damages,<sup>45</sup> at least two point to consideration of an infringer's profits by directing courts to consider "[t]he established profitability of the product made under the patent" and "any evidence probative of the value of [the infringer's] use" of the invention.<sup>46</sup> In short, an award of reasonable royalty damages can amount to a form of "disgorgement-lite," giving the patentee a substantial fraction of the infringer's relevant profits and entangling reasonable royalty determinations in questions of apportionment and technical computation that previously bedeviled court determinations on disgorgement.

#### D. APPORTIONMENT AND OTHER REASONABLE ROYALTY CHALLENGES

The relation between reasonable royalty awards and infringer profits or revenues unsurprisingly has fed controversy over reasonable royalties that has become akin to that over pre-1946 disgorgement awards. In assessing an infringer's relevant revenues or profits, in determining what portion of those revenues or profits properly forms a royalty base for a reasonable royalty, and in applying a royalty rate to this base,<sup>47</sup> courts predictably experience many of the same problems of uncertainty, complexity, and management of expert testimony that previously plagued the disgorgement remedy's apportionment calculus.<sup>48</sup> Complaints of

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<sup>44</sup>Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585, 1650 (1998) ("The good news is that the formal prohibition on restitutionary awards may have little impact on courts' actual behavior.").

<sup>45</sup> 7 CHISUM, *supra* note 22, § 20.07[2] ("Use of the *Georgia-Pacific* factors has been approved by numerous Federal Circuit decisions, and by district courts."); JANICE MUELLER, *PATENT LAW* 639 (4th ed. 2013) ("In determining the contours of the hypothetical negotiation [to determine a reasonable royalty], district courts have traditionally considered evidence ... on an extensive list of factors as set forth in the leading case of *Georgia-Pacific Corp. v. United States Plywood Corp.*").

<sup>46</sup> *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified in irrelevant part*, 446 F.2d 295 (2d Cir. 1971).

<sup>47</sup> *Cf. Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1338 (Fed. Cir. 2009) (discussing issues relating to the choice of a proper royalty base and royalty rate).

<sup>48</sup> *See* H.R. Rep. No. 79-1587, *supra* note 35, at 2 (describing the frequent use of special masters to aid in apportionment as leading to proceedings that "are conducted in accordance with highly technical rules and are always expensive, are often protracted for decades and in many cases result in a complete failure of justice"); 7 CHISUM, *supra* note

excessive complication and potentially disproportionate awards, previously raised in relation to patent law's traditional disgorgement remedy, now arise in relation to reasonable royalty awards. The dramatic rise in the use of juries in patent cases, a phenomenon of the last third of the twentieth century,<sup>49</sup> has arguably exacerbated concerns. Courts have sought to respond. In the past decade, the U.S. Court of Appeals for the Federal Circuit has issued a raft of opinions tightening standards for proving reasonable royalty damages, thereby outlining grounds for district judges to overturn apparently excessive or otherwise unsupported jury awards and, even before this, to exclude expert testimony that the judges find not to properly implement a proper computational methodology.<sup>50</sup> Yet dissatisfaction with the state of legal doctrine and practice on reasonable royalties continues, with some worrying that further shifts in doctrine might make substantial reasonable royalty damages too difficult to obtain, with others contending that existing shifts have not gone far enough.<sup>51</sup>

## II. RESTITUTION PRINCIPLES FOR LIABILITY AND REMEDIES

In addressing questions of how to properly assess reasonable royalty damages, the law of restitution is well suited for comparative study. The law of restitution and its associated commentary embodies a wealth of doctrinal engineering, practical experience, and theory on which patent law might draw. With an eye towards understanding the restitutionary perspective and deriving lessons from it, this Part examines the law of restitution in three movements. Section II.A presents a short primer that introduces the terminology of restitution and unjust enrichment and explains how we define those terms for purposes of this Article. Section II.B introduces relevant sections of the Restatement (Third) of Restitution and

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22, § 20.07[3] (“Computation of the defendant’s profits under the actual advantage concept required resolution of numerous intricate problems both theoretical and pragmatic.”).

<sup>49</sup> Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1705 fig.1 (2013) (showing a dramatic rise in the percentage of patent trials involving a jury from the 1970s on).

<sup>50</sup> See, e.g., Golden, *supra* note 15, at 605 & n.406 (discussing how “[t]he Supreme Court and the Federal Circuit have together limited the availability or value of patent-infringement remedies in a series of cases”).

<sup>51</sup> Compare Richard A. Epstein, *Common Ground: How Intellectual Property Unites Creators and Innovators*, 22 GEO. MASON L. REV. 805, 822 (2015) (“[O]ne risk of the current legislative maneuver is that it seeks first to soften injunctive relief, and second to dilute damages awards so that breach and infringement become profitable strategies.”), with Lee & Melamed, *supra* note 8, at 388 (“Flaws in current doctrine create a reinforcing cycle that perpetuates inflated patent damages ....”).

Unjust Enrichment (“Third Restatement”),<sup>52</sup> most notably § 42 entitled “Interference with Intellectual Property and Similar Rights.” Section II.C then provides a roadmap for the Third Restatement’s reticulated approach to monetary relief for restitutionary wrongs.

### A. RESTITUTION PRIMER

Unlike traditional damages remedies that are tied to a plaintiff’s loss, restitutionary remedies are tied to the potential gains of the defendant.<sup>53</sup> Yet the law of restitution is much more complex than simply instructing a court to issue a gain-based remedy.<sup>54</sup> It is an area of law that, among other things, seeks to shape ex ante behavior to avoid injustices and to tailor its remedies accordingly.<sup>55</sup> While the objective of preventing injustice is clear, the law of restitution is, at times, frustratingly opaque. Part of the uncertainty is due to the varying use and understanding of foundational terms, such as “restitution” and “unjust enrichment.”<sup>56</sup> To lay

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<sup>52</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) (hereinafter THIRD RESTATEMENT).

<sup>53</sup> Many scholars have made this distinction. *See, e.g.*, Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 975-76 (2011) (“The court will base the plaintiff’s recovery of compensatory damages on her loss.” . . . [Conversely,] [t]he court’s baseline guide to restitution is defendant’s gain, not the plaintiff’s loss.”); *see also* PETER BIRKS, UNJUST ENRICHMENT 3 (2d ed. 2005) [hereinafter “BIRKS II”] (“The law of restitution is the law of gain-based recovery, just as the law of compensation is the law of loss-based recovery).

<sup>54</sup> *See* DAN B. DOBBS, LAW OF REMEDIES, DAMAGES, EQUITY, RESTITUTION 366 (2nd ed. 1983). (“Restitution is a simple word but a difficulty subject, partly because restitutionary ideas appear in many guises.”). Not only perhaps is it complex, but “[s]ignificant uncertainty shrouds the modern law of restitution.” Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1191 (1995).

<sup>55</sup> Comments throughout the Third Restatement illustrate how the law of restitution and unjust enrichment seeks to shape ex ante behavior through appropriate selection of the measure of restitution. *See, e.g.*, THIRD RESTATEMENT, *supra* note 52, at § 49 rep. cmt a (explaining the “the measure of restitution is determined with reference to the tortiousness of the defendant’s conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to restitution”) (internal citations omitted); *id.* § 51 cmt e (“The object of the disgorgement remedy – to remove the possibility of profit from conscious wrongdoing – is one of the cornerstones of the law of restitution and unjust enrichment”); *id.* § 51 cmt. f (explaining that gain on embezzling funds should be disgorged if “there would be an incentive to embezzlement if the defendant were permitted to retain the profits”);

<sup>56</sup> Many scholars have noted this particular uncertainty and the problems it has caused (and continues to cause). *See, e.g.*, Kull, *supra* note 54, at 1191-92 (“The linguistic confusion that bedevils the law of restitution—necessitating laborious definitions before anyone can understand what you are talking about—affords an early indication that the common name

the groundwork for comparison of patent and restitution law, this section explains how we understand “restitution” and other related terms used in this Article. As a preliminary matter, we note that, at various times, the Article uses the terms “law of restitution,” “restitution law,” or even just “restitution” as a convenient shorthand for what the Third Restatement characterizes as the “law of restitution and unjust enrichment.”<sup>57</sup> In contrast, this first primer section considers the meanings of “restitution” and “unjust enrichment” separately.

Problems start with the term “restitution” itself. Scholars have noted that “restitution” is “an unfortunate word,”<sup>58</sup> one that is “singularly ill-chosen” insofar that it does not accurately describe the body of law it covers.<sup>59</sup> The term “restitution” was adopted by Reporters Warren Seavey and Austin Scott in the Restatement of Restitution: Quasi Contracts and Constructive Trusts (“First Restatement”), published in 1937.<sup>60</sup> The First Restatement was the first large-scale synthesis of what previously appeared to be disparate principles and rules about what we in the U.S. now call restitution or unjust enrichment. Since the First Restatement, the word

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of this neglected body of law was singularly ill-chosen”); *see also* Stephen G.A. Pitel, *Characterisation of Unjust Enrichment in the Conflict of Laws* 344, in UNDERSTANDING UNJUST ENRICHMENT (Jason W. Neyers et al. eds., 2004) (titling a section of his paper “Unjust Enrichment and Restitution—Terminology Problems”); Rendleman, *supra* note 53, at 977 (explaining a “major source of confusion is that the meanings of the words change between the vernacular language and the technical vocabulary of remedies”).

<sup>57</sup> Indeed, the title of the Third Restatement is “Restatement of the Law: Restitution and Unjust Enrichment.” The treatment of these two terms as synonymous is consistent throughout the Third Restatement, yet not all scholars agree with this treatment. *See, e.g.*, ANDREW BURROWS, *THE LAW OF RESTITUTION* 9 (3rd ed. 2011) (“It has become widely recognised in recent years that there is a fundamental distinction in the law of restitution between restitution of an unjust enrichment and restitution for wrongs”); Stephen G.A. Pitel, *Characterisation of Unjust Enrichment in the Conflict of Laws* 344, in UNDERSTANDING UNJUST ENRICHMENT (Jason W. Neyers et al. eds., 2004) (“The law of unjust enrichment and the law of restitution are not the same, although for many years leading academics claimed that they were.”).

<sup>58</sup> *See* WARD FARNSWORTH, *RESTITUTION: CIVIL LIABILITY FOR UNJUST ENRICHMENT* vii, 12 (2014) (stating that the term “restitution” [s]ometimes [] does not describe what is happening very aptly at all” and that “[t]he word is also unfortunate because it can refer to one of two (or three) things”).

<sup>59</sup> Kull, *supra* note 54, at 1191-1192 (explaining “[t]he linguistic confusion that bedevils the law of restitution—necessitating laborious definitions before anyone can understand what you are talking about—affords an early indication that the common name of this neglected body of law was singularly ill-chosen).

<sup>60</sup> RESTATEMENT OF THE LAW OF RESTITUTION (1937) (hereinafter FIRST RESTATEMENT).

“restitution” has been used to describe a number of different concepts that arguably fall within a larger body of law than the word naturally suggests.<sup>61</sup>

The basic, non-legal definition of restitution is “the act of restoring to the rightful owner that which is lost or has been taken away.”<sup>62</sup> This much is well accepted as within the proper meaning of “restitution”; that is, that restitution includes the remedy of giving back a specific entitlement such as a mistaken payment or a specific piece of property.<sup>63</sup> Yet the term “restitution” is often used beyond this meaning.

Important for our purposes here, as an infringer does not necessarily give back a specific piece of property to a patentee, restitution has been more broadly understood to include the remedy of removing a benefit conferred upon a defendant at the claimant’s expense.<sup>64</sup> The removal of the benefit is commonly achieved by measuring the value of the defendant’s enrichment, and then ordering the defendant to transfer that determined value to the claimant.<sup>65</sup> The underlying cause of action in such a situation is commonly characterized as one for “unjust enrichment.”<sup>66</sup>

A further potential source of confusion is the fact that, for many—indeed, probably for most—lawyers and judges in the United States, the word “restitution” can refer to both a remedy *and* the actual cause of action itself or to either separately.<sup>67</sup> This is likely due to a U.S. tendency to view

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<sup>61</sup> See FARNSWORTH, *supra* note 58, at 12 (explaining restitution can mean a legal claim, a type of remedy, and compensation for criminal victims).

<sup>62</sup> WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1544 (2d ed. 1972); *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES, CASES AND MATERIALS 622 (4th ed. 2010) (“Literally, ‘restitution’ is just a synonym for restoration: Nonlegal dictionaries define it as restoration of property to its true owner, and despite the modern association with unjust enrichment, judges sometimes think of restitution as a way of making plaintiff whole or restoring a previous status quo.”).

<sup>63</sup> See Kull, *supra* note 54, at 1194 (explaining it is accepted that restitution includes “the act of restoration”).

<sup>64</sup> See, e.g., PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 9 (1989); G. VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 3 (1999).

<sup>65</sup> See *supra* note 52, at § 49(3).

<sup>66</sup> BURROWS, *supra* note 57, at 9.

<sup>67</sup> See LAYCOCK, *supra* note 62, at 622 (“‘Restitution’ may mean either the cause of action or the remedy.”); *supra* note 58, at VIII (“[R]estitution is not just a remedy, though it is sometimes misunderstood that way. It is a type of legal claim—a cause in action, and an important one.”).

unjust enrichment as “the heart of liability restitution”<sup>68</sup> or the “‘unitary principle’ which ‘underlies the rules of’ of restitution.”<sup>69</sup>

Similar to restitution, the definition of “unjust enrichment” has been, and remains, a source of much doctrinal and theoretical conversation.<sup>70</sup> For our purposes here, we will define unjust enrichment as the non-consensual benefit that one has received at the expense of another and that the receiving party lacks an adequate legal basis for retaining.<sup>71</sup> Under this definition, unjust enrichment includes both benefits received directly by virtue of a transfer of a discrete thing or set of things, as well as benefits received or obtained indirectly by a transfer or act of appropriation, as through the use of patented technology in violation of another’s patent rights. This broad definition of unjust enrichment is important for purposes of this Article because it is indirect forms of enrichment that tend to generate remedial complications most analogous to those encountered in assessing reasonable royalty damages for patent infringement. Yet it should be acknowledged that including indirect gains within the compass of “unjust enrichment” is a conceptual and terminological step that is not without debate.<sup>72</sup>

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<sup>68</sup> Kull, *supra* note 54, at 1196 (arguing that “restitution be defined exclusively in terms of its core idea, the law of unjust enrichment.”). Similarly, Farnsworth explains that his book on restitution “is about restitution in its core sense: the common-law action that a plaintiff brings to recover a defendant’s unjust enrichment.” *Supra* note 58, at VIII. Scholars around the globe have also argued that restitution and unjust enrichment are synonyms. *See* Pitel, *supra* note 57, at 344, (identifying this long-held position in restitution scholarship). And, most recently in the U.S., criminal law has “appropriated” the term to refer to payments made by criminals to victims. *See supra* note 58, at VII.

<sup>69</sup> HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 12-13 (2004) (hereinafter DAGAN, *RESTITUTION*) (explaining Reporters Warren Seavey and Austin Scott referred to unjust enrichment in this way).

<sup>70</sup> *See, e.g.*, Ernest J. Weinrib, *The Structure of Unjustness*, 92 B.U. L. REV. 1067, 1067 (2012) (beginning his article with the question, ‘What renders an enrichment unjust?’, Weinrib explores possible answers through a corrective justice lens); Mitchell McInnes, *The Reason to Reverse: Unjust Factors and Juristic Reasons*, 92 B.U. L. REV. 1049, 1052 (2012) (exploring the nature of what makes an enrichment unjust); Pitel, *supra* note 68, at 344 (finding “[t]he law of unjust enrichment and the law of restitution are not the same, although for many years leading academics claimed that they were” and taking issue with Birks’ equation of unjust enrichment and restitution).

<sup>71</sup> *See* Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 932 (2012) [hereinafter, Laycock, *Restoring Restitution*].

<sup>72</sup> For example, David Stevens and Jason Neyers argue that allowing for anything other than the giving back of a particular piece of property or of money results in a punitive measure of recovery from the defendant. David Stevens & Jason W. Neyers, *What’s Wrong with Restitution*, 37 ALBERTA L. REV. 221, 234 (1999) (narrowing the scope of the definition by arguing that “[u]njust enrichment is, simply, the non-consensual transfer and retention of value” and explaining this “definition [] is implicit in much of the English

The last term we want to define is one that is often used when discussing the remedy for an unjust enrichment: “disgorgement.” Although, as stated above, the measure of restitution is often tied to the enrichment received, in the situations in which enrichment results from the beneficiary’s own wrongful conduct, this may change, and a disgorgement measure of restitution may apply. Instead of corresponding just to the benefit conferred, the disgorgement remedy involves the measurement and removal of all the defendant’s profit that is appropriate given the higher level of the defendant’s culpability. Due to this higher level of culpability, disgorgement seeks to ensure that the wrong committed is “valueless” to the person who committed that wrong.<sup>73</sup> Disgorgement is used interchangeably in the U.S. with “accounting for profits” and tends to impose a higher burden of proof on claimants than an award for purely compensatory relief.

As these definitions suggest, U.S. law has tended to characterize the law of restitution as a sort of complement to tort law. According to this account of complementary sets of law, the law of restitution focuses on liabilities and remedies for gains received at another’s expense, and tort law focuses quite distinctly on *loss* inflicted.<sup>74</sup> Viewing patent infringement as a form (or variant) of tort, one might then find more understandable the Patent Act’s emphasis on compensating for infringement and its omission of a remedy of disgorgement.

More significantly for purposes of this Article, however, we can see similarities and differences in how the law of restitution and patent law seek to shape *ex ante* behavior. The differences can, in turn, be instructive regarding how patent law might be improved—at least in those circumstances where restitution’s distinctive approach appears to have been successful. Just as restitution and tort commonly operate as complements that share, broadly speaking, common goals of promoting socially desirable behavior and discouraging socially undesirable behavior, the law of restitution and patent law share common goals in a wide set of circumstances. For example, both the law of restitution and patent law

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language writing on the subject”). As restitutionary damages do not seek to punish the enriched party, this is a serious charge. This is just one of the many examples where scholars outside the U.S. disagree with the relatively broad definition of unjust enrichment commonly accepted within the U.S.

<sup>73</sup> See FARNSWORTH, *supra* note 58, at 114 (explaining that “disgorgement” or “accounting of profits” is “meant to make the defendant’s act valueless to him”).

<sup>74</sup> See *id.* at viii (drawing this this complementary relationship between tort and restitution).

encourage parties to enter contractual agreements for “use value”—in patent terms, a license agreement.<sup>75</sup> Moreover, both try to use their respective remedies to deter particularly blameworthy behavior such as the type of behavior that is most often labeled as conscious wrongdoing or willful infringement.

Interestingly, however, restitution and patent law pursue the objective of measuring use value and deterring socially undesirable behavior in markedly different ways. Unlike patent law, and intellectual property law generally, the measure of recovery in restitution law often depends on the blameworthiness of the defendant’s particular behavior. Section II.C discusses this point in detail. Before exploring the various layers of blameworthiness and measures of benefits received, it makes sense, however, to consider how, according to the Third Restatement, one brings a claim that seeks restitution due to an unjust enrichment and also how the Third Restatement itself treats problems of intellectual liability infringement.

#### B. THE THIRD RESTATEMENT ON RESTITUTION AND REMEDIES FOR INTELLECTUAL PROPERTY INFRINGEMENT

Although there were two tentative drafts of a second Restatement on restitution, such a second Restatement was never completed.<sup>76</sup> Published in 2011, the Restatement (Third) is thus the first true successor to the First Restatement. The Third Restatement has generally been well received.<sup>77</sup> Many scholars, both in the U.S. and abroad, have praised Reporter Andrew Kull and the Third Restatement, stating, for example, that the Third

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<sup>75</sup> See *id.* at 10; see also LAYCOCK, *supra* note 62, at 652-53.

<sup>76</sup> Two tentative drafts were put together in the 1980s, but they never went beyond this tentative draft stage. See LAYCOCK, *supra* note 62, at 622.

<sup>77</sup> Multiple symposia, taking place before and after the publication of the Third Restatement, show the level of scholarly interest, importance, and acceptance of the Third Restatement. See, e.g., Symposium, *A Conference On Restitution and Unjust Enrichment*, 92 B.U. L. REV. 763 (2012); Symposium, *Restitution Rollout: The Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH & LEE L. REV. (2011); Symposium, *The Restitution Roundtable*, 65 WASH. & LEE L. REV. (2008); Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001). While these symposia generally reflect a high regard for the Third Restatement, scholars have also made constructive arguments reflecting disagreement with particular positions and provisions within the Restatement. See, e.g., Mark P. Gergen, *Causation in Disgorgement*, 92 B. U. L. REV. 827, 829 (2012) (arguing the Restatement “is on the wrong track” in deciding to combine issues of fact and non-factual policy and fairness considerations).

Restatement “brings clarity and light”<sup>78</sup> to the law of restitution. Additionally, aspects of the Third Restatement have already, and repeatedly, been adopted by courts that look to specific provisions or illustrations for guidance when encountering underdeveloped or unclear law.<sup>79</sup>

Significantly for our purposes, the Third Restatement takes a strong position on the relevance and applicability of restitution law to intellectual property law. Indeed, the Third Restatement itself suggests the utility of comparing restitution law and the law of patent remedies. The Third Restatement explicitly takes the position that intellectual property remedies, including the patent law remedies of lost profits and reasonable royalties, are restitutionary in nature. Consistent with this view, the Third Restatement has a section specifically dedicated to intellectual property, § 42. Section 42 builds upon the first section of the Third Restatement, a conventional starting place for modern claims of unjust enrichment and an equally appropriate beginning point for our analysis.

## 1. RESTITUTION FOUNDATIONS IN THE THIRD RESTATEMENT

Despite the decades between the Restatements, § 1 of the Third Restatement is nearly identical to § 1 of the First Restatement.<sup>80</sup> Providing the foundation for the subsequent sections, § 1 explains that “[a] person who is *unjustly enriched* at the *expense* of another is subject to *liability in restitution*.”<sup>81</sup> This section has four distinct yet interdependent components: (1) liability in restitution, (2) enrichment, (3) expense, and (4) injustice.

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<sup>78</sup> Laycock, *Restoring Restitution*, *supra* note 71, at 929 (further instructing readers that the Third Restatement “should be on every litigator’s bookshelf, and a broad set of transactional lawyers and legal academics would also do well to become familiar with it”); *see also* BURROWS, *supra* note 58, at 9 (explaining that the Third Restatement is a “monumental achievement, for which we have to thank Professor Kull and his advisers, [and it] deserves wide-ranging recognition”).

<sup>79</sup> *See, e.g.*, *Birchwood Land Co., Inc. v. Krizan*, 115 A.3d 1009, 1012 (Vt. 2015) (explaining that on multiple occasions since the publication of the Third Restatement, Vermont has adopted provisions of the Third Restatement when Vermont law is underdeveloped); *In re APA Assessment Fee Litigation*, 766 F.3d 39, 46-47 (D.C. 2014) (looking to the Third Restatement provisions and illustrations to help determine when a claim for unjust enrichment is appropriate in the “‘contractual context’ when the contract does not ‘regulate the parties’ obligations”).

<sup>80</sup> *See* FIRST RESTATEMENT, *supra* note 60, at § 1 (“A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”).

<sup>81</sup> THIRD RESTATEMENT, *supra* note 52, at § 1 (emphasis added).

The language “liability in restitution” is significant because it affirms that restitution provides an independent basis for substantive liability.<sup>82</sup> The use of the term “restitution” is used broadly to describe both the cause of action and the remedy, just as it was in the First Restatement.<sup>83</sup> As noted above, such a flexible and broad understanding of restitution, and its further extension to encompass not only the literal restitution of transferred enrichment, but also more general forms of wrongful gain that might also be characterized as constituting “unjust enrichment,” has generated concern and controversy.<sup>84</sup> One consequence of defining “restitution” in this way is that, as a practical matter, there is necessarily an “inherent flexibility” within the unifying concept of “unjust enrichment.”<sup>85</sup> As a result, reference to a plea of unjust enrichment leaves unclear the boundaries of the nature and scope of the liability in restitution.<sup>86</sup>

Moreover, the Third Restatement leaves unanswered how unjust enrichment should be understood as a theoretical matter. It explains that there is no bright-line rule or mechanical definition that can be applied to unjust enrichment to reliably delineate the nature or scope of liability in restitution.<sup>87</sup> In this sense, the Third Restatement, as with the concept of restitution itself, joins the camp of those who define unjust enrichment broadly.<sup>88</sup> That said, the other three highlighted aspects of § 1 provide practical boundaries to the scope of restitution.

The first of these three predicate components is indicated by the word “enriched,” a term that is often used interchangeably with the notion of receiving or otherwise obtaining a “benefit.”<sup>89</sup> Enrichment refers to the requirement that the recipient’s wealth be increased in some significant

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<sup>82</sup> See *id.* §1, cmt. a (“The identification of unjust enrichment as an independent basis of liability in common-law legal systems . . . was the central achievement of the 1937 Restatement of Restitution. That conception of the subject is carried forward here.”).

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*; see also *id.* §1, cmt. c.

<sup>85</sup> See *id.* § 1, cmt. a.

<sup>86</sup> See *id.*; see also Ernest J. Weinrib, *The Structure of Unjustness*, 92 B.U. L. REV. 1067, 1067 (2012) (explaining “the reference to “unjust” (or “unjustified”) enrichment provides little indication of the source of one’s liability”).

<sup>87</sup> See *Hill v. Cross Country Settlements, LLC*, 936 A.2d 343, 351 (2007) (“Unjust enrichment is a claim . . . that may not be reduced neatly to a golden rule.”).

<sup>88</sup> This observation is not original to us. See, e.g., Mitchell McInnes, *The Reason to Reverse: Unjust Factors and Juristic Reasons*, 92 B.U. L. REV. 1049, 1052 (2012).

<sup>89</sup> See, e.g., HANOCH DAGAN, UNJUST ENRICHMENT 1 (1997) (explaining the components of an unjust enrichment claim and characterizing the first as “a benefit (or enrichment)”).

way, a way that a comment in the Third Restatement describes as “measurable.”<sup>90</sup> In the patent context, enrichment corresponds to a situation in which the defendant has received some sort of measurable benefit due to her infringement of the plaintiff’s patented technology. If the defendant did not gain a benefit from the use or other infringement of plaintiff’s patented technology, even if the defendant’s actions did result in injury to the plaintiff, there would be no liability in restitution.<sup>91</sup> Again, restitution is focused on a defendant’s gains. If there is no gain, there is no restitutionary remedy.

The second limiting component is that the enrichment gained must also have been received at the “expense” of the plaintiff. Oftentimes, the expense of the plaintiff corresponds relatively precisely and automatically to the gain of the defendant. But under the Third Restatement, the concept of expense reaches more broadly. Most simply, an expense is a violation of plaintiff’s “legally protected rights.”<sup>92</sup> Consequently, while § 1 establishes that the enrichment must be at the expense of the plaintiff, a plaintiff asserting a claim in restitution generally does not need to show that it suffered actual loss.<sup>93</sup> Rather, the plaintiff needs only to prove that the defendant gained a measurable benefit through a violation of plaintiff’s rights, regardless of whether actual harm to the plaintiff’s “real world” interests resulted. This means that under the Third Restatement’s approach, the “enriched” and “expense” components for an unjust enrichment would ordinarily be satisfied in the patent context if a defendant has derived some benefit from the infringement of a valid patent belonging to the plaintiff.

The third and last limiting component to the broad definition of “liability in restitution, as used in § 1, is that the enrichment received at the expense of the plaintiff must be “unjust.”<sup>94</sup> The Third Restatement, in its use of “unjust” generally throughout the Restatement and specifically in this section, adopts a broad definition that captures both indirect and direct

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<sup>90</sup> See THIRD RESTATEMENT, *supra* note 52, at § 1, cmt. d (“Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient’s wealth.”).

<sup>91</sup> See *id.* §3, cmt. b (“Cases in which a legal wrong results in injury to the claimant but no benefit to others are not part of the law of restitution.”).

<sup>92</sup> See *id.* § 1, cmt. a.

<sup>93</sup> *Id.* §1, cmt. a (explaining “‘at the expense of another’ can also mean ‘in violation of the other’s legally protected rights,’ without the need to show that the claimant has suffered a loss.”).

<sup>94</sup> *Id.* § 1.

enrichment.<sup>95</sup> The potential inclusion of indirect enrichment, such as a “reduction in necessary expenditures or a reduced obligation to a third party,”<sup>96</sup> is important for purposes of thinking about what lessons restitution law holds for the determination of reasonable royalty damages in patent law. In many cases, an infringer will obtain indirect benefits from the use of patented technology. For example, while an infringer may receive direct enrichment in the form of actual use of the technology, an infringer may also obtain indirect enrichment by reducing its time for further innovation.

Section 1 is not the only portion of the Third Restatement’s opening chapter on “General Principles” that merits attention. Section 4 of the Third Restatement states a principle that is intimately related to § 1’s concepts of enrichment, expense, and injustice—namely, the principle that “[a] person is not permitted to profit by his own wrong.”<sup>97</sup> In combination with § 1, this language from § 4 makes clear that the law of restitution is at its core the law of nonconsensual transfers that cannot be permitted to stand.

## 2. THE THIRD RESTATEMENT AND INTELLECTUAL PROPERTY

Section 42 of the Third Restatement carries forward the principles of § 1 and § 4 to its subject matter, “Interference with Intellectual Property and

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<sup>95</sup> *Id.* §1, cmt. d. The Third Restatement also explains that “unjust” is a term that encompasses within its understanding of injustice what some would distinguish as separate concepts of “unjustified” and “unjust” enrichment. *See id.* at cmt b. “Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.” *Id.* “Unjust enrichment,” on the other hand, might be defined distinctly as enrichment under circumstances such that the benefit gained cannot in good conscience be retained. *See id.* The distinction between unjustified and unjust enrichment might be important when comparing the concept and scope of unjust enrichment in different jurisdictions, including, for example, American law with Canadian law: the Third Restatement itself suggests that the effective “coextensive[ness]” of unjust and unjustified enrichment that it asserts might be a peculiar feature of “American law.” *Id.* The distinction is much discussed in recent restitution literature. Compare DAGAN, RESTITUTION, *supra* note 69, at 18-25 (criticizing the use of “unjustified” and arguing it is a “positivist trap”) with Laycock, *Restoring Restitution*, *supra* note 71, at 932 (explaining the move to prefer ‘unjustified enrichment’ in the Third Restatement makes it clear that something is not unjust because of some “free-floating moral inquiry, but a matter of legal rules”).

<sup>96</sup> THIRD RESTATEMENT, *supra* note 52, at § 1, cmt d.

<sup>97</sup> *Supra* note 52, at § 4.

Similar Rights.” This section is contained within Chapter 5, which covers a variety of forms of “Restitution for Wrongs.”<sup>98</sup> Section 42 states:

A person who obtains a benefit by misappropriation or infringement of another’s legally protected rights in any idea, expression, information, image, or designation is liable in restitution to the holder of such rights.<sup>99</sup>

Some of this language looks familiar from § 1, including the terms “benefit” and “liable in restitution.” These terms should be construed as having the same meaning as they did in § 1. The Third Restatement does not define or give much context to some of the other terms in § 42, notably “misappropriation” and “infringement.” This is intentional.<sup>100</sup> The Third Restatement explains that § 42 addresses “the recovery of profits or use value[,] following unauthorized interference with recognized forms of intellectual property (including patents []).”<sup>101</sup> The determination of whether there has been an unauthorized interference with patents is viewed as governed by federal statute and not the Third Restatement.<sup>102</sup>

The Comments for § 42 illustrate several further aspects that are relevant to our Article. For example, the drafters of the Third Restatement considered whether § 42 should be considered applicable to patents or similar federal rights given the possibility of total preemption by the Patent Act or other federal statutes.<sup>103</sup> The drafters concluded that despite such federal statutes, § 42 applies and effectively characterized patent law’s lost-profits and reasonable royalty measures of monetary relief as restitutionary. Comment a of § 42 reasons that § 42 “authorize[s] remedies that are restitutionary in nature—notably the recovery of an infringer’s profits, or of

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<sup>98</sup> *See id.* ch. 5, §§ 40-46.

<sup>99</sup> *Id.* § 42.

<sup>100</sup> *See id.* § 3, cmt. d (giving §42 as an example where “[t]he law of restitution and unjust enrichment requires the surrender of benefits wrongfully obtained, but it does not tell us whether the defendant’s conduct is wrongful in a particular case.”).

<sup>101</sup> *Id.* § 42, cmt. a.

<sup>102</sup> *See id.* § 42, cmt. a. That is not to say the Third Restatement does not also acknowledge that, generally speaking, it plays second fiddle to how statutes define and regulate intellectual property. *See id.* (“To the extent of any inconsistency [between statutes and the Third Restatement], the rule of § 42—like every rule within this Restatement—yields to the provisions of statute law.”).

<sup>103</sup> *See id.* (“Indeed, statute law so far defines both rights and remedies that it might reasonably be suggested that restitution in the standard infringement scenarios excluded . . . from the scope of this Restatement.”).

‘damages’ measured by the cost of a license.”<sup>104</sup> This comment illustrates the strong position that the Third Restatement takes on intellectual property—namely, that various intellectual property statutes at least partly codify the rule expressed in § 42.

The Comments also explain that judges who believe the relevant intellectual property statute, such as § 284 of the Patent Act, has incorporated the principles of restitution and unjust enrichment should look to the Third Restatement “for guidance on the content of those principles.”<sup>105</sup> In an opinion in *Apple, Inc. v. Motorola, Inc.*,<sup>106</sup> Judge Posner of the U.S. Court of Appeals for the Seventh Circuit, sitting by designation for the Northern District of Illinois, did just this.

Judge Posner’s opinion states that “often a royalty is actually a form of restitution.”<sup>107</sup> Judge Posner pulled directly from the Comments of § 42 in support of invoking restitutionary principles in assessing reasonable royalty damages: he quoted both the observation that an award of “‘the market value of an unauthorized use’” is “‘more accurately described as a species of restitution’” and the conclusion that “[u]nlike the accounting for the infringer’s profits, restitution measured by use value survives in the current Patent Act.”<sup>108</sup> In a substantially earlier instance of drawing on restitution principles in assessing intellectual property remedies, a much-cited opinion by Judge Learned Hand looked to the First Restatement’s treatment of “a constructive trustee” in considering what portion of copyright infringers’ profits should be recoverable by the plaintiffs.<sup>109</sup>

Although jurists other than Judge Posner do not appear to have so clearly embraced § 42’s equation of restitution and reasonable royalty damages, such an embrace is not necessary for restitutionary principles to offer guidance on how to assess the recoverable portion of value obtained from nonconsensual use—a category of value into which reasonable royalty damages comfortable fall. The following part looks at specific mechanics of § 42 and other applicable sections to demonstrate how the Third

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* § 42 cmt. a.

<sup>106</sup> *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp.2d 901 (N.D. Ill 2012).

<sup>107</sup> *Id.* at 910 (explaining this “form of restitution” as “a way of transferring to the patentee the infringer’s profit, or, what amounts to the same thing, the infringer’s cost savings from practicing the patented invention without authorization”).

<sup>108</sup> *Id.* at 916.

<sup>109</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939).

Restatement can provide guidance to courts confronted with a claim to reasonable royalty damages.

### 3. ASSIGNING REMEDIES FOR INFRINGEMENT

Section 42 is not a standalone provision. One must turn to other sections of the Third Restatement to understand how to remedy an interference with intellectual property.<sup>110</sup> Section 42 establishes that a patent holder subjected to infringement has a restitution claim, and, correspondingly, that the infringer is subject to liability in restitution to the patent holder.<sup>111</sup> Yet beyond these basics, there is little detail in § 42. Among other things, § 42 does not contain language concerning the potential measure or calculation of recovery, although the Comments do discuss the “use value” terminology quoted by Judge Posner.<sup>112</sup> Section 42 also does not give much context regarding the “person” liable in restitution.

Chapter 7 of the Third Restatement, the Third Restatement’s “Remedies” chapter, fills in these gaps with an organized network of doctrines regulating the award of monetary relief. There are two variables within restitution law that provide opportunity for deeper reflection on how patent law might address some questions about how to assess reasonable royalties for patent infringement: (1) possible ways of measuring the defendant’s gains and (2) classification of the defendant’s behavior in ways that may impact the measurement of gains.

These two variables interact together to enable restitution law to respond in a flexible yet predictably regulated manner to a variety of scenarios. Perhaps the simplest are members of a set of scenarios in which no analysis of the value of an unjustly acquired gain is required, and, concomitantly, no analysis of blameworthiness is required because restitution straightforwardly calls for return of a specific and uniquely determined monetary amount. The classic example here is the return of a mistaken payment.

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<sup>110</sup> A previous draft of §42 seemed to suggest a standalone provision, one that did not require a reader to refer to later parts of the Third Restatement. It had the measure of recovery built into the rule, as well as the identification of the three types of infringer, although the language was different and might have involved some distinctions that were ultimately rejected. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, *Tentative Draft No. 4* (April 18, 2005).

<sup>111</sup> See *infra* text 19-20 and accompanying notes.

<sup>112</sup> See THIRD RESTATEMENT, *supra* note 52, at § 6, cmt. a.

In more complex cases, such as ones in which the unjustly enriched party has made independent contributions to the value of benefits obtained, a court may have to engage in detailed consideration of one or both of the variables of value and blameworthiness. For such cases, the Restatement tends first to consider the variable of blameworthiness and then uses this variable's value to help determine the proper measure of gains that the plaintiff has a right to recover.<sup>113</sup> The Third Restatement explains that the first step in the blameworthiness inquiry is to identify the basic type of "person" that has been unjustly enriched. The Third Restatement identifies four basic types: the innocent recipient, the faultless wrongdoer, the unwitting or unconscious but responsible wrongdoer, and the conscious wrongdoer.<sup>114</sup> Further, as indicated in section II.C below, the Third Restatement breaks down at least some of these types into relevant subtypes.<sup>115</sup> Similarly, the Third Restatement provides a taxonomy of measures of monetary relief, and the blameworthiness classification determines what subset of these measures may apply in a particular case. Section II.C discusses the nature of and interaction between these parallel taxonomies in more detail.

### C. RESTITUTION'S RETICULATED APPROACH TO MONETARY RELIEF

Section II.B's discussion of the Third Restatement and its account of restitutionary principles already suggests ways in which approaches to monetary relief under the law of restitution might inform the awarding of reasonable royalty damages for patent infringement. This section provides more specific bases for comparison and reform by examining in greater detail the law of restitution's highly reticulated approach to monetary relief. This approach offers a menu of alternative measures of monetary relief that, in turn, interacts significantly with the classification of levels of fault or responsibility on the parts of both the victim and the recipient of unjust enrichment. Moreover, the layering of allowances for context sensitivity does not end there. In addition to regulating the measure of monetary relief in ways that reflect context-sensitive assessments of relative fault as well as attention to the purposes of overarching legal regimes, the law of restitution shows similar context sensitivity in regulating the assignment and intensity of burdens of proof and production. The resulting amalgam of layers of ordered context sensitivity enables the law of restitution to achieve a

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<sup>113</sup> *Id.* ch. 7, topic 1.

<sup>114</sup> *See id.* ch. 7, topic 1, p. 175.

<sup>115</sup> *See id.*

combination of relative coherence, substantially clear ex ante incentives, and significant flexibility to which crafters of patent law’s reasonable royalty damages might do well to aspire—a possibility that this Article explores in Part III.

This Section explains the law of restitution’s reticulated approach to monetary relief in three movements. First, it identifies alternative measures of monetary relief that the law of restitution makes available. Second, it considers how the law of restitution defines levels of relative fault or responsibility for unjust enrichment and the significance that restitution law assigns to such fault or responsibility, in particular with respect to applicable measures of unjust enrichment. Third, it discusses how the law of restitution shows sensitivity to the underlying purposes of relevant legal regimes and to the limitations of evidence, including expert testimony, that parties can assemble to support particular values for monetary relief.

### 1. ALTERNATIVE MEASURES OF UNJUST ENRICHMENT

The Third Restatement provides a helpful catalog of different potential measures for monetary relief. At least by one count, the number of such potential measures totals to eight.<sup>116</sup> The first two measures apply in the alternative in a case of “[e]nrichment from a money payment”:

- (1) the “amount of the payment” or
- (2) “the resulting increase in the defendant’s net assets, whichever is less,”<sup>117</sup>

where the Third Restatement uses the term “defendant” to refer to the recipient of unjust enrichment and the term “claimant” to refer to a party seeking relief from the unjust enrichment of another.<sup>118</sup> Because of the limited application of these first two measures of recovery to cases of mistaken payment, we will not discuss them further.

The Third Restatement’s next four measures are more to the point. They specify remedies for an “[e]nrichment from the receipt of nonreturnable benefits,” such as the benefits received from patent infringement. They include:

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<sup>116</sup> See *id.* § 49 (listing “Measures of Enrichment”).

<sup>117</sup> *Id.* § 49(2).

<sup>118</sup> See *id.* § 49(1) (“A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant’s unjust enrichment.”).

- (3) “the value of the benefit in advancing the purposes of the defendant”;
- (4) “the cost to the claimant of conferring the benefit”;
- (5) “the market value of the benefit”; or
- (6) “a price the defendant has expressed a willingness to pay, if the defendant’s assent may be treated as valid on the question of price.”<sup>119</sup>

The final two measures are in some ways less truly individual measures than sets or categories of measures that have their own more detailed articulation:

- (7) “the amount of the profit wrongfully obtained,” a measure applying “[w]hen restitution is intended to strip the defendant of a wrongful gain”;<sup>120</sup> and
- (8) measures of unjust enrichment including “[s]upplemental enrichment in the form of interest or use value, proceeds, and consequential gains.”<sup>121</sup>

The fifth measure, the “market value” measure, is generally the most pertinent in relation to efforts to assess reasonable royalty damages for patent infringement. As discussed below, this measure ordinarily applies to the unwitting or unconscious infringer—for example, in the patent context, an infringer that was not aware of relevant patent rights prior to the lawsuit.<sup>122</sup> The Third Restatement explains that, “where appropriate,” the reasonable cost of a license may be used to identify this market value, thereby connecting this measure tightly to the notion of a reasonable royalty.<sup>123</sup> Because the measure is an objective one of market value, the recovery under this measure might be higher than the actual value or use value<sup>124</sup> to the defendant.<sup>125</sup>

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<sup>119</sup> *Id.* § 49(3).

<sup>120</sup> *Id.* § 49(4).

<sup>121</sup> *Id.* § 49(5).

<sup>122</sup> *Id.* § 51(2).

<sup>123</sup> *Id.*

<sup>124</sup> The term “use value” includes the possibility of a supplemental enrichment that may be “in the form of interest rest, or other measure of use value.” *Id.* § 53(1). The potential relevance and availability of measures of supplemental enrichment comes after, if ever, liability in restitution generally is established. *Id.* §53, Reporter’s Note, a.

<sup>125</sup> *Id.* § 51, cmt. c.

In turn, the seventh measure of monetary relief, “the amount of profit wrongfully obtained,” might be more than both the market value and the provable loss to the plaintiff. This measure is characteristically associated with the conscious wrongdoer—a party that acts with either the knowledge of the wrong or “despite a known risk that the conduct in question violates the rights of the claimant.”<sup>126</sup> This type of person, the conscious wrongdoer, will be further discussed in the next subparts. In short, however, such wrongdoers are generally viewed as most culpable and are typically liable for their “net profit attributable to the underlying wrong,”<sup>127</sup>—the disgorgement measure of relief that many people associate primarily and, incorrectly, even solely with restitution law. The aim of this measure of relief is to take from the defendant all of the profit received through the defendant’s wrongdoing.<sup>128</sup> The Third Restatement is careful to define what “profit” means in this context: profit must be identifiable, it must be measurable, but it may include “any form of use value, proceeds, or consequential gains.”<sup>129</sup>

The above discussion begins to suggest how the law of restitution uses different measures of monetary relief to achieve a fair amount of ordered context sensitivity. But a fuller understanding of such context-sensitive deployment requires greater understanding of restitution’s graded scale for the relative fault of the unjust-enrichment claimant and defendant. This scale is the subject of the next subsection, which will describe the Third Restatement’s different classifications of fault or responsibility and then explain how these interact with deployment of the measures of enrichment listed above.

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<sup>126</sup> *Id.* at 51(3).

<sup>127</sup> *Id.* § 51(3).

<sup>128</sup> See *supra* note 52, at § 51(4) (“The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.”); see also *S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) (“Despite some casual references in our caselaw to the contrary . . . disgorgement is not precisely restitution. Disgorgement wrests ill-gotten gains from the hands of a wrongdoer.”); Gergen, *supra* note 77, at 829 (criticizing the often-repeated statement in the Third Restatement that “disgorgement is meant to defer but not to punish, as if these were distinct goals[, for] [d]eterrence is one purpose of punishment.”) (citations omitted).

<sup>129</sup> THIRD RESTATEMENT, *supra* note 52, § 51(5)(a). Section 53, in turn, defines “proceeds” and “consequential gains.” Most interesting in light of the nature of patented technology, consequential gains “are profits realized through the defendant’s subsequent dealings with such an asset . . . .” *Id.* § 53 (3).

## 2. DEFINITION AND SIGNIFICANCE OF FAULT OR RESPONSIBILITY

The Third Restatement emphasizes that, although its various proffered measures for unjust enrichment can “yield different amounts,” they do not necessarily do so.<sup>130</sup> According to the Third Restatement, when the measures lead to different output totals, “the choice between them is dictated by general principles of unjust enrichment, turning chiefly on the innocence or blameworthiness of the defendant.”<sup>131</sup> Hence, to understand how the measures apply, one needs to understand the Restatement’s classification of levels of fault or responsibility for the enriched party. From least at fault or responsible to most at fault or responsible, the basic classification includes at least six categories of recipients of unjust enrichment.

Under the Restatement’s scheme, there are three significant forms of “innocent recipient,” a person who is “legally blameless”<sup>132</sup> in that she “commits no misconduct in the transaction concerned” and “bears no responsibility for the unjust enrichment.”<sup>133</sup> These variants of innocent recipients are as follows:

- (1) an innocent recipient who did not request relevant benefits;<sup>134</sup>
- (2) an innocent recipient who requested relevant benefits but under circumstances “depriv[ing the request] of significance” such as those of “fraud or incapacity”;<sup>135</sup> and
- (3) an innocent recipient who requested relevant benefits in the absence of such invalidating circumstances.<sup>136</sup>

A common scenario in which there is an innocent recipient is one in which the recipient benefits from a mistaken payment or a mistaken service. Importantly, patent infringers generally cannot qualify as innocent recipients under the Third Restatement’s taxonomy. Instead, they are at

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<sup>130</sup> *Id.* § 49 cmt. a.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 50 cmt. a.

<sup>133</sup> *Id.* § 50(1).

<sup>134</sup> *Id.* § 50(1)–(3).

<sup>135</sup> *Id.* § 50 cmt. e.

<sup>136</sup> *Id.* § 50(1)–(2), (4).

best faultless wrongdoers under a regime of strict liability.<sup>137</sup> Nevertheless, the category of innocent recipient is instructive for our purposes, not because it maps directly onto a relevant category of infringers in patent law, but instead because it helps exemplify restitution law’s use of tiers of fault or responsibility and because it helps illuminate the sort of “floor” on remedies that might correspond to the lowest available level of fault or responsibility.

Understandably, the Third Restatement is protective of innocent recipients, generally using only relatively restrictive measures of the degree to which they have been unjustly enriched.<sup>138</sup> Although the Third Restatement states that “[a]n innocent recipient may be liable in an appropriate case for [direct results of the relevant transaction such as] use value or proceeds,” the Restatement general forbids innocent-recipient liability “for consequential gains,”<sup>139</sup> which are “profits realized through the defendant’s subsequent dealings with [a relevant] asset, or through the defendant’s interference with the claimant’s rights.”<sup>140</sup> For “unrequested benefits,” the innocent recipient’s unjust enrichment “is measured by the standard that yields the smallest liability,”<sup>141</sup> and the resulting liability “may not leave the recipient worse off (apart from the costs of litigation) than if the transaction giving rise to the liability had not occurred.”<sup>142</sup> For “requested benefits,” the innocent recipient’s unjust enrichment is typically given by “their reasonable value to the recipient,” “normally the lesser of market value and a price the recipient has expressed a willingness to pay.”<sup>143</sup> In circumstances where the significance of the recipient’s request is significantly undermined, “a more restrictive standard” for measuring unjust enrichment may apply,<sup>144</sup> such as the applicable standard for unrequested benefits.<sup>145</sup>

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<sup>137</sup> See *infra* text accompanying notes 146-150.

<sup>138</sup> *Id.* § 50 cmt. f (“The liability in restitution of a person who qualifies as an innocent recipient is determined by rules that are notably solicitous of the defendant.”).

<sup>139</sup> *Id.* § 50(5); see also *id.* § 53(3).

<sup>140</sup> *Id.* § 53(2).

<sup>141</sup> *Id.* § 50(2)(a).

<sup>142</sup> *Id.* § 50(3).

<sup>143</sup> *Id.* § 50(2)(b).

<sup>144</sup> *Id.* § 50(2)(c).

<sup>145</sup> *Id.* § 50 cmt. e (“[I]f the incapacitated party cannot be presumed to derive the usual advantage from the benefits in question—the basis of any market price—enrichment may be measured as if the benefits were unrequested.”).

The Third Restatement provides three further categories of fault or responsibility levels for recipients who have obtained benefits through “misconduct,” which is defined broadly to encompass both “culpable” or nonculpable behavior that constitutes “actionable interference by the defendant with the claimant’s legally protected interests for which the defendant is liable” in restitution.<sup>146</sup> These levels correspond to the following categories of recipients of unjust enrichment:

- (4) a recipient who has engaged in misconduct “without fault” such as a non-negligent and otherwise non-culpable tortfeasor who is liable under a regime of strict liability;<sup>147</sup>
- (5) a “responsible” recipient “who is not a conscious wrongdoer” but has significantly contributed to the unjust enrichment through “(a) negligence; (b) misrepresentation, whether tortious or not; (c) breach or repudiation of a contract with the claimant, whether enforceable or not; (d) unreasonable failure, despite notice and opportunity, to avoid or rectify the unjust enrichment in question; or (e) bad faith or reprehensible conduct”;<sup>148</sup> and
- (6) a “defaulting fiduciary” or “conscious wrongdoer” “who acts (a) with knowledge of the underlying wrong to the claimant, or (b) despite a known risk that the conduct in question violates the rights of the claimant.”<sup>149</sup>

The defaulting fiduciary might be considered a special subcategory that is largely tangential to the purpose of making analogies to patent infringement and thus will be generally omitted from the discussion below.

As might be expected by analogy with treatment of the different categories of innocent recipients, the categories of recipients who have committed some form of misconduct correspond to different levels of stringency with respect to the relevant measures for unjust enrichment. For purposes of restitution law, faultless misconduct, such as that committed by “innocent converters, unconscious trespassers, and unwitting infringers,” leads to liability “in restitution for the market value of the rights they have ‘taken,’” a measure that, under some circumstances, “exceeds any value actually realized by the defendant” but that, under other circumstances,” is

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<sup>146</sup> *Id.* § 51(1).

<sup>147</sup> *Id.* § 51 cmt. a.

<sup>148</sup> *Id.* § 52(1).

<sup>149</sup> *Id.* § 51(3).

substantially less than realized value because it excludes “consequential gains” and “proceeds not constituting unjust enrichment.”<sup>150</sup> In contrast, responsible recipients are often subject to measurements of liability that are “more protective of the claimant” and, in the worst cases, such as situations involving bad faith, can be equivalent to those for conscious wrongdoers.<sup>151</sup> A conscious wrongdoer is commonly subject to a remedy of disgorgement of “the net profit attributable to the underlying wrong,”<sup>152</sup> including “proceeds and consequential gains that are not unduly remote.”<sup>153</sup> According to the Third Restatement, “[t]he object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.”<sup>154</sup>

With respect to measures for unjust enrichment, the Third Restatement’s treatment of relative fault or responsibility extends beyond consideration of the enriched party’s fault or responsibility in isolation. The restitution claimant’s fault or responsibility can also play a role in determining the appropriate measure, as when the claimant has engaged in some form of relevant behavior such as fraud, another form of legal violation, or a failure to perform as agreed in association with the relevant transaction.<sup>155</sup>

### 3. SENSITIVITY TO LAW’S PURPOSE AND EVIDENTIARY LIMITATIONS

Assessments of relative fault or responsibility can affect not only the measure for unjust enrichment but also the standards for satisfying burdens of proof or production with respect to specific enrichment amounts. Such standards can be particularly crucial in situations in which courts look to disgorge profits because courts do not then “impose a general forfeiture” of all that is gained “from a tainted transaction” but instead seek to engage in the commonly difficult and uncertainty-plagued task of identifying, and limiting relief to, “the amount of the gain that is attributable to the underlying wrong.”<sup>156</sup>

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<sup>150</sup> THIRD RESTATEMENT, *supra* note 52, § 51 cmt. c.

<sup>151</sup> *Id.*; *see also id.* § 52(2).

<sup>152</sup> *Id.* § 51(4).

<sup>153</sup> *Id.* § 53(3).

<sup>154</sup> *Id.* § 51(4).

<sup>155</sup> *Id.* § 50 cmt. e.

<sup>156</sup> *Id.* § 51 cmt. i.

Here, the Third Restatement rejects the “traditional formula ... that the claimant has the burden of proving revenues and the defendant has the burden of proving deductions.”<sup>157</sup> Instead, the Restatement champions what it describes as “a more modern and generally useful rule that the claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant’s unjust enrichment,” after which production “the defendant is then free ... to introduce evidence tending to show that the true extent of unjust enrichment is something less.”<sup>158</sup> The Restatement’s burden of production “is ordinarily met as soon as the claimant presents a coherent theory of recovery in unjust enrichment”—for example, by “show[ing] a causal connection between defendant’s wrongdoing and a measurable increase in the defendant’s net assets.”<sup>159</sup> This approach is presented as consistent with “the equitable disposition that resolves uncertainty in favor of the claimant against the conscious wrongdoer,” thereby assigning to the conscious wrongdoer “the risk of uncertainty arising from the wrong.”<sup>160</sup>

More generally, the Third Restatement repeats a point separately made by Dan Dobbs in his treatise on the law of remedies—namely, that “restitution should be measured to reflect the substantive law purpose that calls for restitution in the first place.”<sup>161</sup> Dobbs lists among potentially relevant possibilities (1) respect for “the defendant’s autonomy and right of choice,” including a desire not to have the relevant benefit that might make monetary relief minimal or even altogether inappropriate; (2) respect for “the joint autonomy of the parties as expressed [a] contract, such as a contract rejecting “a restitutionary remedy” for purposes agreed risk allocation; (3) “statutory policy”; and (4) disfavor for “conscious wrongdoing or the violation of especially prized standards such as the standards of honesty imposed upon fiduciaries.”<sup>162</sup> Dobbs notes how the policy behind the statute of frauds might counsel limiting the scope of a remedy in restitution to effectuate the purposes of the statute by not permitting a party to obtain the equivalent of full expectation damages through restitution when the statute bars obtaining them through contract.<sup>163</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> 1 DAN B. DOBBS, LAW OF REMEDIES § 4.5(1), at 629 (2d ed. 1993); *see also* THIRD RESTATEMENT, *supra* note 52, at § 49 cmt. a (quoting Dobbs); *id.* § 49 rep. note a (same).

<sup>162</sup> DOBBS, *supra* note \_\_, § 4.5(1), at 630.

<sup>163</sup> *Id.*

### III. CROSS-POLLINATION POSSIBILITIES FOR REASONABLE ROYALTIES

The law of restitution offers potential instruction for how courts might manage the assessment of reasonable royalties for patent infringement. In particular, patent law can learn from restitution's deployment of a reticulated set of measures for monetary relief and a corresponding set of classifications for parties' relative fault or responsibility. Patent law can also learn from restitution's sensitivity to practical difficulties of proof and questions about whether the remedy awarded will serve relevant law's underlying purpose. In general, these lessons suggest that, without dramatic increase in the complexity of the judicial task, courts can make reasonable royalty determinations significantly more responsive to findings of legal responsibility, practicalities of proof, and patent law's stated constitutional purpose "[t]o promote the Progress of Science and useful Arts."<sup>164</sup> In this way, courts might subtly but substantially shift assessments of reasonable royalties toward greater reliance on findings of legal responsibility and understandings of statutory purpose that lie more centrally within the Article III courts' realms of competence than the economic analyses of patent value that have dominated recent controversies. This shift offers promise in helping to improve patent law's performance both in deterring socially undesirable conduct and in encouraging socially desirable conduct in accordance with patent law's fundamental aims.

#### A. ADDITIONAL ECONOMIC MEASURES OR FACTORS

The law of restitution's attention to policy concerns and allowance for alternative measures of monetary relief suggest that at least two potential measures of an invention's economic value might sensibly play more prominent roles in the assessment of reasonable royalty remedies. A first measure is the cost of the relevant processes of invention and innovation undertaken by the original inventor or patent holder. A cost measure is straightforwardly suggested by the Third Restatement's presentation of cost to the claimant as one of the potential measures for monetary relief in restitution.<sup>165</sup> By promising reimbursement where a patent holder might otherwise walk away empty-handed, a cost measure also appears facially consistent with the language of the Patent Act

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<sup>164</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>165</sup> See *supra* text accompanying note 119.

specifying that damages are to provide adequate compensation<sup>166</sup> as well as the general purpose of patent law to promote innovation for the purposes of benefiting society as a whole.<sup>167</sup> More specifically, a cost measure that seeks to provide a patentee with an appropriate return for reasonable costs associated with innovation, comports with a commonly stated guideline for tailoring patent law to its social-welfare-promoting purpose—namely, the instruction that patent law should provide a reward that is just large enough to cover the pertinent costs, including opportunity costs, associated with innovation so that the socially optimal level of these activities are stimulated at the least expense to society as a whole.<sup>168</sup>

Of course, there would be substantial problems with adopting cost or cost-plus-reasonable-reward as the measure for reasonable royalties in the mine run of patent cases. Cost measurement can raise difficult accounting questions and could encourage manipulation of accounts simply for the purpose of making patent protection more effective. Further, a broadly applicable cost measure could encourage profligate investment in innovation or divert innovative effort from activities that offer great innovation bang per invested buck to activities that are expensive but less socially productive. Requiring that relevant costs be objectively reasonable and not only actually incurred should help prevent the worst potential distortions of private behavior in this regard. But concerns would justifiably remain.

Nonetheless, evidence on reasonable costs of innovation seems to merit at least some attention in reasonable royalty analysis. As an at least sporadic factor in such analysis, reasonable costs of innovation could provide a useful, commonsense check on outlandishly large or small assessments of patent value proffered by parties' expert witnesses. Further, a cost measure for damages might be used in some circumstances as a backup or alternative to another measure—for example, by providing that a patentee should in limited circumstances recover the lesser of (1) the reasonable cost of pertinent innovative activity and (2) a fraction, in

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<sup>166</sup> 35 U.S.C. § 284.

<sup>167</sup> See Golden, *supra* note 2, at 509 (“assum[ing] a utilitarian goal that is standard in modern accounts: the patent system should act to promote the development, disclosure, and use of new technologies, ideally in a way that maximizes social welfare”).

<sup>168</sup> See David O. Taylor, *Using Reasonable Royalties to Value Patented Technology*, 49 GA. L. REV. 79, 117 (2014) (“[L]egal scholars have made the case that reasonable royalties should provide just enough incentive for prospective patent owners to invent, but no more.”); cf. Ted Sichelman, *Innovation Factors for Reasonable Royalties*, \_\_ REV. LITIG. \_\_ (201\_) (proposing use of “evidence of R&D commercialization, and opportunity costs ... to set a range of ‘reasonable royalties’”).

accordance with industry norms and excluding any “hold-up costs” reflective of sunk investments, of the lowest plausible cost of implementing a technological alternative to the patented invention of essentially equivalent functionality (a “design-around”). The relevant limited circumstances could be ones in which a patentee cannot otherwise provide adequate evidence to support a reasonable royalty award or in which a patentee’s application for relief is substantially unsympathetic for reasons such as those discussed in section III.B below.

Despite limitations chronicled above, cost-based measures for compensation are commonly used by governments and private parties in contracting with suppliers of innovation.<sup>169</sup> Thus, their omission from the laundry list of *Georgia-Pacific* factors in assessing reasonable royalties is surprising. The law of restitution suggests that cost can be included as an alternative measure or factor in assessing monetary relief without undermining the administrability or deterrent potential of the more general legal scheme. Patent damages law can likewise incorporate at least somewhat greater attention to relevant and reasonable costs of innovative activity.

Other potential factors in reasonable royalty assessment are the overall social value of the invention and the technical significance of the inventor’s achievement. Neither of these factors seems very amenable to acting as a measure of monetary relief itself. Assessment of overall social value or technical significance is likely difficult to do with the precision necessary to justify a specific monetary award. On the other hand, like cost, these factors relate to the underlying purpose of patent law to promote substantial inventions and innovations, and they might helpfully inform the assignment and calibration of burdens of proof or production in ways that align with how the law of restitution deploys concerns with fault or responsibility to set burdens or to break deadlocks generated by uncertainty or evidentiary “ties.”

Worries that patents threaten to unduly “tax” or block later innovation might commonly reflect suspicion that, from a social standpoint, many patents involve only trivial inventions at best. At the remedies stage of a patent case, courts need not be helpless to address this concern. Judges and juries might be expected to be reasonably competent at making at least a [trivial from the standpoint of social value or technical significance. In

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<sup>169</sup> See Golden, *supra* note 2, at 539 (noting “[g]overnment experiences with cost overruns in the procurement of military technology”).

this respect, judges and juries might draw useful instruction from the sort of external evidence of nonobviousness already used in assessing patent validity, including factors such as scientific acclaim or relevant failure of others.<sup>170</sup> An assessment that substantial evidence supports a conclusion that a patented invention is of especially high or low social significance could lead to the application of more indulgent or demanding requirements, respectively, for proof of a reasonable royalty. Even if limited to such extreme cases, such adjustments to the demands for proof of damages could significantly add to confidence that patent law will fulfill its promise for innovators who contribute the most social value while not overly clogging paths to further innovation with heavy taxes for adoption of the most incremental and marginal of prior patentable advances.

#### B. A MORE RETICULATED APPROACH TO FAULT OR RESPONSIBILITY

Reasonable royalty assessment might also follow the law of restitution in taking account of parties' relative fault or responsibility in ways that go beyond the current blunderbuss approach of permitting enhanced damages or attorney fee shifting in situations involving willful infringement or other exceptional circumstances, but otherwise leaving concerns with fault or responsibility substantially outside of the patent damages calculus.<sup>171</sup> The law of restitution's different gradations of fault or responsibility suggest that the law of reasonable royalties might consider using different measures of relief or different evidentiary rules, standards, or presumptions in situations involving, for example, (1) independent inventors who, despite reasonable diligence, were unaware of the relevant patent or alternative embodiments thereof; (2) infringers who, because of the nature of claiming or continuation practice or because of arguable surprises in claim construction or application of the doctrine of equivalents, did not receive practically achievable and customary notice of their potential infringement in advance; (3) infringers for whom no especially mitigating or aggravating circumstances apply; (4) probabilistically conscious infringers who were properly on notice of a substantial risk of infringement; and (5) conscious infringers who might satisfy legal standards

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<sup>170</sup> *Apple Inc. v. Samsung Elecs. Co.*, 816 F.3d 788, 804-05 (Fed. Cir. 2016) (discussing evidence supporting a finding of nonobviousness).

<sup>171</sup> See Amanda Frye, "*Inextricably Commingled*": *A Restitution Perspective in Patent Remedies*, 26 HARV. J.L. & TECH. 669, 686 (2013) ("The patent field could import a restitutionary focus on the culpability of the wrongdoer to create a sliding scale of infringement.").

for willful infringement. Reticulation of measures, burdens, and presumptions with respect to reasonable royalties to take account of such gradations of fault or responsibility might enable patent law to better deter socially undesirable infringing activity and to better promote socially desirable innovation by patent-obtaining inventors and their followers alike.

Reticulation might operate on both ends of the scale of relative fault. For example, a conscious infringer might face not only potential enhancement of damages as a result of willful infringement, but also be required to make a prima facie showing that it would be unreasonable to assess damages using an “entire market” approach, rather than placing the burden for justifying this approach on the patentee. Conversely, greater evidentiary burdens might confront a patentee who has, in some sense, helped bring about infringement, for example, by sitting quietly on rights after notice of potentially infringing activity or by providing poor notice of patent scope through atypically opaque patent drafting that, although not generating clear and convincing evidence of invalidity, nonetheless flirts with the borders of claim indefiniteness or inadequate written description. Effectively extremizing the results of litigation in this way would make the threat of having to pay substantial damages, perhaps even enhanced damages, more substantial for conscious infringers whom, because of the conscious nature of their infringement, properly designed law might best be able to deter.<sup>172</sup> Likewise, such extremized results in cases of notably poor patent notice should encourage patentees to do more to fulfill the patent system’s promise as a means of securing effective public disclosure.<sup>173</sup>

As an alternative to focusing on extremes in poor patentee or infringer behavior, one could imagine a true ladder of measures of relief or evidentiary burdens corresponding to distinct levels of relative fault as between a patentee and adjudged infringer. But for simplicity in this initial pass at what the law of restitution might teach the law on reasonable royalties, we presently sketch only how one might design a system focused on deterring the extremes.

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<sup>172</sup> Cf. Anup Malani & Jonathan S. Masur, *Raising the Stakes in Patent Cases*, 101 GEO. L.J. 637, 641 (2013) (arguing for “enhanced rewards and penalties” in patent litigation to better “compensate holders of valid, valuable patents” and “reduce or eliminate invalid patent owners’ opportunities to earn positive returns at trial”).

<sup>173</sup> *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) (“The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design ....”).

The proposal to extend consideration of relative fault to regulation of how reasonable royalty damages are assessed might be viewed as an extension of patent law's currently much more minimally multi-tiered approach to dealing with levels of blame. Courts may already award reasonable attorney fees to prevailing parties in exceptional circumstances<sup>174</sup> and may already enhance damages awarded to the patentee<sup>175</sup> when merited by "egregious infringement behavior."<sup>176</sup> Making at least some degrees of relative fault relevant for more mainline remedies such as reasonable royalty awards should make more effective the patent system's efforts to encourage comparatively poor behavior by both patentees and potential infringers.

Of course, one might worry that making the reasonable royalty calculus sensitive to relative fault could be too effective in the sense that it either spurs over-reliance lawyers or excessively chills behavior that rational policymakers would not want to discourage. This concern might be cause for proceeding cautiously, such as by focusing initial tweaks on extremes of behavior as discussed above. If one proceeds in this way, there should be little initial danger of artificially creating demand for attorney opinion letters in the manner of a previously abandoned Federal Circuit approach, which had indicated that courts could draw an adverse inference with respect to willfulness from an adjudged infringer's failure to produce evidence of an earlier opinion of counsel that was contrary to the court's ultimate conclusions on validity and infringement.<sup>177</sup> There is no proposal here for an adverse inference from a failure to produce an attorney opinion letter, and confinement of our most detailed proposal to extremes of relative fault should lead to chilling effects or pressure to consult an attorney being substantially, if not wholly, confined to situations in which parties should be on notice of the likelihood of their engaging in what might later be perceived as relative misbehavior. In short, consistent with restitution's

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<sup>174</sup> 35 U.S.C. § 285.

<sup>175</sup> *Id.* § 284.

<sup>176</sup> *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016).

<sup>177</sup> *See Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344-46 (Fed.Cir. 2004) (en banc) (holding that refusal to produce an opinion of counsel and "failure to obtain an exculpatory opinion of counsel" do not provide bases for "an adverse inference" about what such an opinion says or would have said), *overruled in irrelevant part by In re Seagate*, 497 F.3d 1360 (Fed. Cir. 2007), *overruled in irrelevant part by Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *cf.* 35 U.S.C. § 298 ("The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed ....").

approach to monetary remedies, there seem practicable ways of incorporating sensitivity to relative fault into the assessment of reasonable royalties—and of doing so in ways that will encourage best practices and discourage worst practices with respect to both patentee and infringer behavior.

## CONCLUSION

The law of restitution illustrates how, in addressing questions of difficult-to-quantify monetary relief, courts can develop a context-sensitive yet coherent approach that responds to underlying public policy, has available an array of different measures of relief, and deploys both these measures and burdens of proof or production in ways that distinguish between levels of relative responsibility or fault. In awarding reasonable royalties in patent law, courts might similarly consider an inventor's costs and an invention's social value in addition to an infringer's revenues, profits, or other benefits from use of the invention. Moreover, there is much the law of reasonable royalties can do to incorporate concerns of relative responsibility or fault in a way that is more finely tuned to set proper incentives than the current, on-off approach to enhanced damages for willful infringement. In short, without having to embrace restitution as a fundamental theory for patent remedies, patent law can learn much from the law of restitution's multilayered set of doctrines for regulating the award of monetary relief.