

Do We Place the Apes Near the Cats? -- Placing IP Infringement Remedies on the Map of the Remedies Zoo

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Abstract

One can imagine a zoo that is organized in such a way that animals are placed so that their proximity to the center of the zoo is related to the proximity of species' genomes to that of the human genome. Bonobos, chimpanzees, gorillas, orangutans, baboons and other apes would be placed close to the center; the aviary, the herpetarium and the insectarium would lie closer to the periphery in this hyper-organized zoo. A similar ordering might be available to assist one who wants to understand remedies for IP infringement in light of remedies for breaches of other obligations. In order to create a map to this remedies zoo, several questions need to be answered, not the least of which is why certain breaches result in one type of remedy while other breaches do not.

In the first part of the Article, a review of various remedies for breaches of obligations is in order. As a starting point for comparison, the claim of patent infringement and its attendant remedies will occupy the center of the zoo and will collectively serve as the benchmark for comparison to other claims for breaches of obligation and their respective remedies. In the second part of the Article, the sorting process begins in an effort to determine the relatedness of various causes of actions to the cause of action of patent infringement. The types and functions of the remedies available for each cause of action as well as the underlying interest the law seeks to protect by permitting such cause of action are examined.

In the final part of the Article, the author concludes that the sorting and mapping exercise exposes a greater relatedness between a claim of misappropriation of a trade secret to a claim of patent infringement than a claim of copyright infringement has to a patent infringement claim, although the remedies are not identical under US law. An argument is set forth that remedies for trade secret misappropriation, including disgorgement of the wrongdoer's profits, should be included in the panoply of remedies available for patent infringement. As a result, in a coherent remedies zoo, the claim for trade secret misappropriation is located very near the center of zoo, as the cause of action most closely related to a claim of patent infringement. An open question remains as to whether the tendency to view intellectual property as a monolithic beast with standard characteristics subject to similar remedies is detrimental to efforts at reforming intellectual property laws. We may have inadvertently placed our cats too close to our apes in our remedies zoo.