

A Nonvolitional Conduct Exemption to Strict Liability for Patent Infringement, or the Problem of Insufficient Thought Control

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This article argues that strict liability in patent law should be less strict than it currently is. It argues that something similar to the nonvolitional conduct exemption that exists in other legal doctrines premised on strict liability should be imported into patent law. Specifically, it argues in favor of a *constructive-nonvolition* exemption. Unlike conventional notions of nonvolition, constructive nonvolition does not turn solely on the defendant's physiological control over his body. Constructive nonvolition instead identifies the circumstances under which the defendant exercised insufficient control over his actions to justify patent liability. In particular, it focuses on the cost that a defendant must incur in order to either avoid infringing a patent or reduce the benefit that he receives from using the patented technology. If the defendant's choice set is constrained in a way that makes an obligation to avoid use of or benefit from the technology both inefficient and unfair, the defendant's use is constructively nonvolitional, and the defendant should qualify for an exemption from strict liability for patent infringement. To illustrate the impact that such an exemption would have in contemporary patent practice, this article addresses recent the Federal Circuit opinions in *SmithKline Beecham Corp. v. Apotex* and *Monsanto Canada Inc. v. Schmeiser* and explores how the opinions would have been altered if a constructive nonvolition exemption from strict liability had been considered.

This article also brings the newly minted concept of constructive nonvolition to bear on claims that recite inventive, reflexive acts of thinking. The patent claim that was recently at issue before the Supreme Court in *Laboratory Corp. v. Metabolite Laboratories* demonstrates that the PTO allows inventors to propertize simple acts of human reasoning that the public of thinkers cannot control. This article argues that the patentee in *Laboratory Corp.* was the beneficiary of economically and constitutionally overbroad patent protection because the lower courts failed to implement a constructive-nonvolition exemption from strict liability for patent infringement.