

Causal Responsibility and Patent Infringement

Dmitry Karshtedt

This article argues for an increased role for principles of causal responsibility in the law of patent infringement, and its principal contribution is to suggest that notions of causation can help us better deal with longstanding problems in direct and indirect infringement cases. Currently, patent law maintains a rigid distinction between what I term “non-performers”—entities that do not themselves carry out steps of patent claims, and “performers”—entities that do. The former, with few exceptions, can be liable only on indirect infringement theories, while the later, in contrast, are subject to liability for direct infringement. The article argues that this distinction should break down in cases where a non-performer’s level of involvement in ensuring that the steps of a patent claim are carried out, and its intent in reaching that goal, are so high that the non-performer can be said to have caused the performance of the steps. The article draws upon the innocent instrumentality doctrine in criminal law, and related doctrines and theories—including the distinction between causal and noncausal accomplices in criminal law—to support this approach. More generally, the article sets forth criteria for determining when the acts of a performer should be imputed to the non-performer in patent cases based on causation principles.

The causation approach has three significant implications for patent law. First, it would generally make it easier to establish infringement liability for manufacturers who provide products that are configured in such a way that their natural utilization by customers results in patent infringement. This is as it should be, for it is the manufacturers, rather than their customers, that are truly responsible for the infringement. Second, this approach provides a way to deal with the vexing problem of divided infringement, which generally entails the lack of any infringement liability in cases where the steps of a patent claim are carried out by two or more separate entities. Under the causation framework, which avoids the troubled and unsatisfactory “control or direction” test, the divided infringement problem may essentially reduce to the first scenario. If the manufacturer performs some of the steps of the claim, and causes the remaining steps to be performed by a customer, it would be liable for patent infringement. And finally, the causation approach would absolve customers of liability in certain scenarios. Where the entity that is accused of direct infringement is merely an innocent instrumentality of the manufacturer, it would not be liable in spite of the strict liability nature of the underlying tort.