

Affixers, Encroachers, Tweakers and Derivers: A Taxonomy of "Improvement Doctrines" in Property and IP

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When a person makes significant improvements to another's land, chattels or informational assets, without the owner's permission, difficult equitable and remedial issues can arise. "Improvement doctrines" across the spectrum of real property, personal property and intellectual property law have developed to mediate conflicts between owners and improvers of property.

In the real property context, for example, the doctrine of ameliorative waste allocates rights and responsibilities when a current possessor seeks to make improvements to property over a future interest holder's objections. Still other real property doctrines ask who should capture the value of mistaken improvements to land owned by another. The doctrine of accession addresses similar disputes involving one party's mistaken and unauthorized improvement of another's personal property. In the patent context, "blocking patents" and the reverse doctrine of equivalents attempt to balance the interests of original technology owners and subsequent improvers. And to a lesser extent, the doctrine of fair use mediates similar conflicts in the copyright context.

In this work-in-progress, I classify and compare the various "improvement doctrines" in property and IP to glean why improvers are treated differently in these contexts. To what extent is the improver's mental state or intent relevant to the inquiry, and to what extent can such differences be explained by the values these various "improvement doctrines" seek to promote? Despite the criticisms of analogizing tangible property to IP, property law's "improvement doctrines" may nonetheless help us understand and improve "improvement doctrines" in IP. A better understanding of property law's robust and varied improvement doctrines certainly challenges the (increasingly contested) presumption that property law unwaveringly favors strict exclusive rights for owners, and may have normative implications for IP law.