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Patents Are Property: A Fundamental But Important Concept

The U.S. economy is largely based on a free market model which favors competition over government regulation. Strong private property rights are a necessary underlying element of a successful free market economy.¹ United States law has long reflected this view.² Once something is legally designated as property, the law provides certain rights to the owner of that property.³ Those rights, often referred to as a bundle of rights, give the owner the right to decide how property is used.⁴ This includes the right to permit or exclude others from using the property and the right to freely transfer all or a part of the property to others.⁵ Typically, the law allows a property owner to exclude unauthorized invasion of property via injunctive relief without regard to whether the invasion results in any damage.⁶ The mere non-permissive invasion of property rights is actionable under a trespass theory.⁷ This is in contrast to other bodies of law.⁸ In an action for breach of contract, for


⁴ Id.

⁵ Id.

⁶ See Roger A. Cunningham et al., The Law of Property 414–15 (2d ed. 1993) (explaining that property owners have the right to exclude others and that trespassers can be held liable even if no damage caused).

⁷ See id. at 415.

example, damages are a necessary element. Likewise, a tort action for negligence or product liability requires proof of damages.

It is generally recognized that patents are intangible personal property. The United States Constitution’s clause enabling Congress to enact patent law specifically states that the law shall grant an exclusive right in inventions to inventors. An exclusive right is merely another way of referring to a property right. The current patent statute expressly states that patents are property. This is affirmed by numerous Supreme Court decisions and lower court decisions holding that patents are property. Consequently, patent owners should be entitled to protect patent property rights from invasion of third parties without regard to whether the patent owner is injured by infringement. This was the longstanding black letter law prior to the recent Supreme Court decision in eBay Inc. v. MercExchange, L.L.C.

Patent owners, like all property owners, are not unconditionally entitled to property-based remedies for infringement. Traditionally, property owners are entitled to remedies that vindicate unrestricted use of property if a countervailing public policy does not exist. If such a policy does exist, it may need to be balanced against a property owner’s rights. All property rights are subject to limitations


10. Keeton et al., supra note 8, at 164-65.


12. U.S. CONST. art. I, § 8, cl. 8. "To promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries . . . ." Id.

13. See generally Intl News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) ("Property depends upon exclusion by law from interference . . . ."); id. at 250 (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").


16. See, e.g., Patlex Corp. v. Mootinghoff, 758 F.2d 594, 599 (Fed. Cir. 1985); Blum v. Comm'r, 183 F.2d 281, 287 (3rd Cir. 1950); Heywood-Wakefield Co. v. Small, 96 F.2d 496, 500 (1st Cir. 1938).


18. Cont'l Paper Bag v. E. Paper Bag Co., 210 U.S. 405, 430 (1908); see also Jeneric/Pentron, 259 F. Supp. 2d at 194 (stating that a permanent injunction is the general remedy for patent infringement).

19. 547 U.S. 388, 394 (2006) (holding that patent owners are not entitled to the property-based remedy of permanent injunctive relief for patent infringement).

20. Id.

21. See id. at 396-97 (Roberts, C.J., concurring).

necessary for the furtherance of countervailing public policies. Restrictions attached to the sale of real property—such as total restraints on alienation—are usually void as a matter of law. The public benefit of free marketability of property typically outweighs the property owner's right to prohibit transferability by a purchaser of his or her property. The existence of nuisance law, zoning law, and land use regulations can limit a real property owner's freedom to engage in certain otherwise legal uses of property. However, such restrictions are viewed as necessary, in some circumstances, for the benefit of the public. Use and resale restrictions may also apply to tangible personal property to further certain public policies. Intellectual property rights under both copyright law and trademark law are also subject to limitations based on the importance of free speech encapsulated in the First Amendment.

Determining whether public policy limitations should restrict traditional property-based remedies for patent infringement requires an examination of the justification for protecting patent rights. Fostering innovation, the classic argument in favor of patents, is expressly enshrined in the Constitution and recognized as legitimate by most commentators and economists.

23. See, e.g., Gösta Schindler, Wagging the Dog? Reconsidering Antitrust-Based Regulation of IP-Licensing, 12 MARQ. INTELL. PROP. L. REV. 49, 82 (2008) ("Easements, servitudes, or the laws of nuisance are general examples of legal limitation of property rights induced by social or public policy considerations."); Robert P. Burns, Blackstone's Theory of the "Absolute" Rights of Property, 54 U. CIN. L. REV. 67, 85 (1985) ("Although private property is said to be an absolute right, the protection of which is a primary aim of government, absolute rights are largely sacrificed for the blessings of civil society.").

24. Dukeminier et al., supra note 22, at 195 (stating that absolute restraints on the alienation of real estate are void).

25. See id.

26. See Cunningham et al., supra note 6, at 512 (explaining that government can control private land use through regulation).

27. See Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 509-10 nn.6-7 (Cal. 1990) (en banc) (Mosk, J., dissenting) (explaining that public health and safety lead to the restriction of some property rights).

28. See, e.g., id. at 510 n.10 (stating that under California law, a licensed sportswoman can give away wild fish and game she has caught or killed, but she cannot sell them).


32. Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of . . . inventors in 'Science and useful Arts.'").


Substantial investments of labor and capital for developing innovative products will only occur in a free market economic system if the potential exists for a monetary return. This basic concept is codified in the Constitution which incentivizes inventors to engage in development of innovations with the economic potential of property rights in those innovations. The resulting fruits of this inventive conduct benefit society in general which is the ultimate goal of patent law.

The second justification for patent law is the increase in the public storehouse of knowledge that results from the public disclosure of patented innovations. This is insured by strict public disclosure requirements included in the patent law. These requirements mandate that a patent application and any subsequently issued patent must fully enable a person knowledgeable in the relevant area of technology to make and use the invention based on the disclosed information. Patent applications are generally made available to the public eighteen months after being filed with the U.S. Patent and Trademark Office. If the patent is rejected, the information contained in the application remains in the public domain. If the patent is granted, the patent and the entire written record of the adversary process involved in obtaining the patent is released to the public.

Patents, despite being property, should be denied property-based remedies for infringement only if legitimate countervailing public policy interests outweigh granting traditional property remedies. This requires a critical examination of the asserted reasons for limiting or restricting the economic value of patents.

Opponents of patent law often argue that patents create monopolies, thus preventing some members of society from being able to acquire certain patented products. However, the vast majority of patents, despite high acquisition costs,
fail to generate substantial revenue. Often, little market demand exists for
the invention. Additionally, market substitutes frequently exist for patented
inventions that prevent the patent owner from being able to exert significant market
power.

A minority of patents generate substantial revenue. The pharmaceutical industry,
for example, relies heavily on patents to generate substantial profits. Although
the inability to obtain a patented product is frequently not problematic, this may
be untrue if the invention is a life-saving pharmaceutical. This makes the pharma-
caceutical industry a common target for anti-patent advocates. The high cost of
patented prescription drugs undoubtedly leads to some patients being denied ap-
propriate treatment. Reducing the economic value of patents by limiting the avail-
ability of property-based remedies for infringement has superficial appeal in terms
of acting as a method of reducing the cost of pharmaceuticals, thereby making
them more widely available. However, the more likely result will be less invest-
ment in pharmaceutical research which will produce fewer life-saving drugs.

asmonopoly.pdf (considering the argument that intellectual property created monopolies); Thomas J. Krumenacher, Protection for Indigenous Peoples and their Traditional Knowledge: Would a Registry System Reduce the Misappropriation of Traditional Knowledge?, 8 MARG. INT’L PROP. L. REV. 143, 147 (2004) (criticizing Western patent laws because they prevent access to patented medicines). But see Fox, supra note 39, at 1011 (explaining how public policy considerations trump monopoly concerns).


48. See Lemley, supra note 34, at 1041 (noting that most patents fail to produce any market power).

49. See Bessen & Meurer, supra note 46, at 8.

50. Id.


53. Sean Flynn, Legal Strategies for Expanding Access to Medicines, 17 EMORY INT’L L. REV. 535, 540–41 (2003) ("The median household income is only about $1000 a year. It is fair to say that the $2000 price tag for [AIDS-related virus drugs] in South Africa, and the $750 public sector price, puts the drugs far out of reach of most people in need.").

54. But see id. at 545 (arguing that transforming the patent right from a property rule to a liability rule can increase access to life-saving pharmaceuticals while allowing patent holders to retain their patents and receive royalties).

ditionally, the high profit potential from patented pharmaceuticals can be pro-competition. 56 A successful drug creates or establishes the existence of a lucrative product market. 57 This provides an economic incentive for competitors to develop new drugs that provide the same benefits in order to capitalize on the established market. 58 This also creates marketplace alternatives that can limit the market power of a single producer and restrict prices. 59 Moreover, an incentive exists to improve existing drugs to gain market share. 60 All of this conduct ultimately benefits the public. 61 Most notably, when a patent expires and a patented drug enters the public domain, generic drug manufacturers can produce and sell the drug covered by expired patents at greatly reduced prices while still earning substantial profits. 62 This is possible because the generic producers do not have to recoup huge drug development costs. 63 Absent the original research and development by the patent owners, generic drug manufacturers will have nothing to produce.

The proliferation of non-practicing entities, 64 derisively called patent trolls, 65 is a frequent basis for asserting the need to reduce the economic value of patents by

56. See Claude E. Barfield & Mark A. Groombridge, Parallel Trade in the Pharmaceutical Industry: Implications for Innovation, Consumer Welfare, and Health Policy, 10 Fordham Intell. Prop. Media & Ent. L.J. 185, 205-06 (1999) (discussing that the hypercompetitiveness within the pharmaceutical industry is leading to repetitive R&D efforts, but is also contributing to a rapidly increasing pool of public knowledge).

57. Michael Sertic, Muddying the Waters: How the Supreme Court's Decision in Merck v. Integra Fails to Resolve Problems of Judicial Interpretation of 35 U.S.C. § 271(E)(1), the "Safe Harbor" Provision of the Hatch-Waxman Act, 17 Health Matrix 377, 431 (2007). A breakthrough drug is one that has no similar substitutes on the market. Id. Thus, a breakthrough drug enjoys a period of pure market exclusivity, during which "the potential exists for the breakthrough innovator to earn a relatively high return on R&D investment." Id.

58. Id. ("A lower-risk strategy for drug discovery firms is to develop me-too drugs, which act through an identical mechanism as a breakthrough drug to treat the same medical indication.").

59. Id. ("The introduction of me-too drugs leads to competition in brand name drugs resulting in lower pricing of both the breakthrough and me-too drugs . . . ").

60. See Smith & Mann, supra note 39, at 263 ("[C]ompetitors who are unable to practice a patented invention will often search for new ways to improve their products or solve a problem, and this search itself can result in a further technological advance.").


62. See id. at 649-50 (explaining that the Hatch-Waxman Act facilitates FDA approval for generic drugs by reducing the time and cost of the approval process, which ultimately benefits the consumer by providing access to lower-priced off-patent drugs).

63. Sertic, supra note 57, 384-85 ("[T]he generic manufacturer is not required to repeat lengthy and costly safety and efficacy testing required of the pioneer drug manufacturer as part of the Investigational New Drug Application (IND) and New Drug Application (NDA) processes.") (footnotes omitted).

64. Miranda Jones, Permanent Injunction, A Remedy by Any Other Name Is Patenty Not the Same: How eBay v. MercExchange Affects the Patent Right of Non-Practicing Entities, 14 Geo. Mason L. Rev. 1035, 1036 n.6 (2007) (non-practicing entities are companies that license patent rights but produce no products).

weakening property-based remedies. Justice Kennedy's concurring opinion in eBay alludes to such entities as an underlying problem that justifies eliminating the entitlement to a property-based remedy for patent infringement. This view coincides with opinions expressed by some industry spokespersons who view trolls as entities that merely drive up the cost of products without providing any public benefit. However, the inventors behind the patents asserted by non-practicing entities are often inventors who have been unsuccessful introducing an invention into the marketplace. An inventor's lack of success often reflects an inability to raise adequate capital and a lack of marketing expertise. In a successful free market economy, specialization develops because it is efficient. Consequently, an inventor may excel at innovation while other people excel at raising capital and providing marketing. An inventor's patent helps to level the economic playing field by making it difficult for dominant market enterprises to ignore inventors. Absent the ability to assert patent property rights, fewer inventions will be patented and the public storehouse of knowledge will decrease without the public disclosure from those patents.

67. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring) ("When... the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.").
69. See Antonio Regalado, Tiny Company Wields Patents Against Giants, Wall St. J., Mar. 9, 2001, at B1 (describing a company that acquires intellectual property from inventors who were unsuccessful at entering the market, pressures infringing companies into paying royalties or settlements, and shares the profits with the inventors); see also Andrew Beckerman-Rodau, The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C., 10 Tul. J. Tech. & Intell. Prop. 165, 172 (2007) ("Frequently, the independent inventor or small startup lacks the enormous resources to bring a patent infringement suit. In such cases, they may assign the patent to an entity that funds the infringement suit in return for a percentage of any recovery.") (footnotes omitted).
70. Beckerman-Rodau, supra note 69, at 172 (noting that startup companies often fail to convert a patented invention into a commercial success because they cannot raise adequate capital and lack marketing expertise).
71. See The MIT Dictionary of Modern Economics 113 (David Pearce ed., 4th ed. 1992). Specialization or division of labor, which is an important part of any successful free market economy, is defined as "[t]he process whereby labour is allocated to the activity in which it is most productive - i.e. in which it can make best use of its skills. As a result no one person carries out all the tasks in the production..." Id.
72. Beckerman-Rodau, supra note 69, at 172 (citing the inability to raise capital and to market the patented inventions as common reasons for startup failure).
73. See Sari Gabay, Note, The Patentability of Electronic Commerce Business Systems in the Aftermath of State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 8 J.L. & Pol'y 179, 222 (1999) (patents enable small startup e-commerce enterprises to raise capital so they can compete with larger established enterprises); Regalado, supra note 69 (noting that ownership of patents can level the playing field between large and small businesses).
74. Mark A. Chavez, Gene Patenting: Do the Ends Justify the Means?, 7 Computer L. Rev. & Tech. J. 255, 261 (2003) ("Patents encourage ingenuity, which results in an increase in the general knowledge base and
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Some industries complain that patents drive up the costs of making and selling products.\textsuperscript{75} Those costs then act as an innovation tax that must ultimately be passed on to consumers.\textsuperscript{76} Even if this argument is true, it must be analyzed in light of several general aspects of the United States legal system. First, the law is frequently used for social engineering.\textsuperscript{77} Business enterprises are not permitted to operate in a totally free marketplace.\textsuperscript{78} For example, laws to protect worker health and safety, and environmental regulations are imposed on business enterprises.\textsuperscript{79} These regulations add costs that ultimately must be factored into the price of goods and passed onto consumers.\textsuperscript{80} In light of this, expenses generated by the patent system are simply another cost of doing business which is justified by the general societal advantage of encouraging innovation for the ultimate benefit of the public.\textsuperscript{81}

A second and related factor is that law is typically neutral so it may affect entities differently.\textsuperscript{82} While the electronics and software industries have asserted negative economic consequences from the current patent system, the pharmaceutical industry argues that the current patent system is vital for its economic survival.\textsuperscript{83} In particular, the electronics and software industries are strong supporters of weaken-

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\textsuperscript{75} See Michael Chapin, Note, Sharing the Interoperability Ball on the Software Patent Playground, 14 B.U. J. SCI. \\ & TECH. L. 220, 232–34 (2008) (noting that current patent standards stifle software innovation because cost prohibition and network effects create a barrier to entry in the market); see also Bate, supra note 52 (discussing the anti-pharmaceutical patent group’s promotion of compulsory licensing to reduce the cost of pharmaceuticals and thereby increase access).


\textsuperscript{77} Frank V. Williams, III, Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts, 29 CAMBELL L. REV. 591, 717 (2007) (“Activists in the judiciary have accepted the reconstitution of the social order as the goal of the judicial branch by redefining the judicial power. Consequently, we have a concept of law as the multifaceted, coercive techniques of social engineering in the hands of judges.”).


\textsuperscript{79} See, e.g., 29 U.S.C. § 654(a) (2006) (requiring each employer to provide a workplace free from recognized hazards that are “causing or are likely to cause death or serious physical harm”); 33 U.S.C. § 1411(a) (2000) (prohibiting the transport of material for dumping into ocean waters).

\textsuperscript{80} Heather A. Steinmiller, Steel Industry Watch Out! The Kyoto Protocol is Lurking, 11 VILL. ENVTL. L.J. 161, 193–95 (2000) (positing that increased regulation in the energy industry could dramatically increase the production cost of steel, and thereby increase the price of products sold to consumers).

\textsuperscript{81} See generally Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) (noting the patent system “promotes disclosure of inventions, to stimulate further innovation and to permit the public to practice the invention once the patent expires.”).

\textsuperscript{82} Compare Ian Ayres & Gideon Parchomovsky, Tradable Patent Rights, 60 STAN. L. REV. 863, 870–71 (2007) (explaining that the software industry grows by “incremental and cumulative” contributions, so that progress almost always necessitates some form of patent infringement and can therefore be stifled by strict patent protection), with Barfield & Groombridge, supra note 56, at 213–15 (discussing pharmaceutical research and development’s dependence on patent protection).

\textsuperscript{83} Barfield & Groombridge, supra note 56, at 214.

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ing property-based remedies for patent infringement\textsuperscript{84} while the pharmaceutical industry supports strengthening property-based remedies.\textsuperscript{85}

It is impossible to tailor the law to reflect all the various market conditions faced by different industries.\textsuperscript{86} Likewise, modifying patent law to help one industry at the expense of another is not in the interest of the public nor is it beneficial to our economy over the long term.\textsuperscript{87} This is especially true today with rapid technological changes often affecting different segments of the marketplace in inconsistent and unforeseen ways.\textsuperscript{88} Even if the patent law could simultaneously serve the needs of individual industries, the rapid changes in technology would require never ending modifications of the law.\textsuperscript{89} This would undermine the certainty and predictability of the law which is a major strength of the United States legal system.\textsuperscript{90}

Different business entities must develop unique marketplace strategies to survive.\textsuperscript{91} This includes developing methods of dealing with patent-related costs in conjunction with the many other unexpected changes in marketplace conditions in a free market economy.\textsuperscript{92} For example, marketplace uncertainties such as the recent

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\item See, e.g., Brief for Business Software Alliance et al. as Amici Curiae Supporting Petitioners at 4, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 338 (2006) (No. 05-130) (urging the Court to adopt an equity-based test to determine whether to grant an injunction as opposed to the current practice of automatically issuing an injunction upon a showing of infringement); Brief for Nokia Corp. as Amici Curiae Supporting Petitioners at 5–6, MercExchange, 547 U.S. 338 (No. 05-130) (arguing for reversal of the Federal Circuit’s automatic injunction rule in favor of an equity-based test).
\item See, e.g., Brief for Pharmaceutical Research and Manufacturers of America as Amici Curiae Supporting Respondents at 2–3, MercExchange, 547 U.S. 338 (No. 05-130) (arguing against reversal of the automatic injunction rule in order to preserve strong patent protection and thereby safeguard the incentive to innovate).
\item See Barfield & Groombridge, supra note 56, at 213 (outlining the factors which make tailoring patent systems to individual products difficult).
\item Barfield & Groombridge, supra note 56, at 213–14 (discussing the inability to create an industry-specific patent system because the information required to do so is constantly shifting—demand, R&D costs, market structure—and thus generally unobtainable).
\item See Randall v. Sorrell, 548 U.S. 230, 243–44 (2006) (stating that stare decisis is "the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. . . . Departure from precedent is exceptional, and requires 'special justification.' . . . This is especially true where . . . the principle has become settled through iteration and reiteration over a long period of time."). (citations omitted). See generally David M. Becker, Debunking the Sanctity of Precedent, 76 WASH. U. L.Q. 853, 854–55 (1998) (discussing the importance of certainty in law to ensure predictability).
\item John S. Brown, Research that Reinvents the Corporation, HARV. BUS. REV., Aug. 2002, at 105, 105 (citing rapid technological changes and unsteady business markets as forces propelling the need for constant innovation, not only in product development but also in business practices and processes).
\item See Chapin, supra note 75, at 233–34 (identifying three methods—standard setting bodies, cross license agreements, and open source—that the software industry is currently using to ensure interoperability despite the increasing difficulty to do so in light of patent-related costs, namely costly licensing fees to avoid infringement).
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rise in fuel costs have impacted businesses by increasing overall costs which may be
difficult to pass onto consumers in the current weak economy. The airline industry has been greatly impacted by higher fuel costs. Nevertheless, some airlines have weathered the impact by effectively using financial transactions to hedge fuel costs. Likewise, advances in digital technology coupled with widespread availability of high speed Internet connections have ravaged certain segments of the entertainment industry. The number of brick and mortar stores selling music on CDs and the number of video rental stores has precipitously declined over the last few years. Both types of stores are likely to disappear in the future or be reduced to serving a niche market.

The weakening or limiting of property-based remedies for patent infringement is not justified due to countervailing policies. Hence, robust property-based remedies should be generally available to patent owners as a response to patent infringement.


95. See Pae, American Airlines, supra note 93.

96. See Hiatt & Serpick, supra note 88; see also Anita Campbell, The Long Slow Decline of Video Stores, BLOG CRITICS MAGAZINE, Feb. 13, 2004, http://blogcritics.org/archives/2004/02/13/231940.php (predicting that video stores will be obsolete in ten years as customers transition to renting films from cable and Internet providers).

97. Hiatt & Serpick, supra note 88.

98. Campbell, supra note 96.

99. Hiatt & Serpick, supra note 88; Campbell supra note 96.