PROPERTY RULES, LIABILITY RULES, AND PATENT LAW: LEGAL EXPERIMENTS IN THE CATHEDRAL

In their seminal 1972 article, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, Guido Calabresi and A. Douglas Melamed proposed an analytic framework for comparing entitlements protected by property rules, liability rules, and inalienability rules. The influence of this theoretical framework has permeated legal scholarship, extending well beyond tort and property law, and into doctrinal areas such as corporate, securities, contract, criminal, and intellectual property law. To use the nomenclature of Calabresi and Melamed, United States’ patent law contemplates both property rules (injunctions) and liability rules (damages). Until 2006, upon prevailing in a patent infringement suit, a patent owner was almost always granted a permanent injunction to prevent further infringement of the patent in suit by an adjudicated infringer. Under this regime, an owner of a valid and infringed patent was effectively entitled to a permanent injunction as a matter of right. As the Court of Appeals for the Federal Circuit stated in MercExchange v. eBay, there is a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."

However, the Supreme Court subsequently overturned the Federal Circuit's "general rule" in eBay v. MercExchange, instead asserting that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district court, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." Empirical data derived from patent cases decided since eBay v. MercExchange indicate that patent owners who prevail on the issue of infringement have been granted permanent injunctive relief approximately 72% of the time. This suggests that there has been a substantial shift away from property rules (injunctions) and, consequently, relatively greater emphasis on liability rules (damages) compared with the previous regime in which injunctions were granted as a matter of right. This study involves the design and use of an experimental approach to test directly the hypothesis that amounts of innovation, productivity, wealth, and other social amenities vary across patent systems that tend to emphasize property rules or liability rules. Employing a dynamic computer simulation of patent systems, and human experimental trials, four treatments were explored: relief for patent infringement via (1) permanent injunctive relief, (2) damages, (3) both permanent injunctive relief and damages, or (4) neither permanent injunctive relief and damages. Experimental data from human trials confirm the hypothesis that amounts of innovation, productivity, and wealth generated by inventors vary across different regimes of property rules and liability rules. Amounts of innovation, productivity, and wealth tend to be higher in treatments offering either permanent injunctive relief or permanent injunctive relief and damages, and lower in treatments offering only damages. Through the particular lens of patent law, this study offers the first experimental test of the general Calabresi-Melamed hypothesis that property rules and liability rules should yield differential outcomes.