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What Kind of Rights Are Intellectual Property Rights?

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1. Intellectual Property Rights as Rights

The phrase is common enough that it rolls off the tongue: intellectual property rights. It even has a well-known acronym, 'IPRs.'[1] But are they really rights? And if so, what kind of rights? Most importantly, what difference does it make that they are rights – what practical import does this carry? These are the questions I take up here.

I begin by clearing up some misunderstandings about legal rights. The primary one is that rights are absolute. A secondary one is that one need do nothing to obtain or exercise a right, and that therefore any legal entitlement that requires affirmative steps to secure cannot be a right. Next I consider a prominent critique of the idea that IP rights are property rights, which holds that they are more akin to government regulation. After that I turn to an enumeration of the details of IP rights, described in the terms laid down by the prominent theorist of legal relations, Wesley Newcomb Hohfeld. Two special problems then draw my attention: injunctions in IP law and constitutional takings of IP rights. Finally, I conclude with some observations about why, when properly framed, engaging in 'rights talk' about IP does not inexorably point to absolutist views. Throughout I emphasize two highly consistent thoughts: IP rights are real rights; but they are limited rights. They dominate some interests but not all, and they are subject to restrictions and limitations that third parties sometimes hold as rights also.

1.1 Intellectual Property Rights Are *Property* Rights

If IP rights are rights, the next logical question is: what kind? The brief answer is that they are property rights. As is well understood, these are true rights, though for many they are not at the top of the hierarchy of rights. In liberal political theory, that place is usually reserved for fundamental civil rights such as freedom of conscience, freedom of speech, freedom to make lifestyle choices, the right to fair criminal procedures, and the

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[1] According to the useful Google Ngram tool, which tracks the occurrence of words and phrases in millions of books over time, the first appearance of 'intellectual property right' came in 1931; gained greater prominence by the 1980s; and then increased over 100 times between 1980 and 2008. *See* https://books.google.com/ngrams (search for 'intellectual property rights'). *See generally* Jean-Baptiste Michel, et al., Quantitative Analysis of Culture Using Millions of Digitized Books, 331 Science 176 (14 Jan. 2011), available at http://science.sciencemag.org/content/331/6014/176.

[2] John Rawls, A Theory of Justice 302 (1971).

[3] Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

[4] Robert Nozick, Anarchy, State and Utopia (1974).

[5] *See, e.g.*, Arthur Ripstein: Force and Freedom: Kant's Legal and Political Philosophy 67 (2009): 'For Kant, property in an external thing— something other than your

like.[2] Libertarians, however, often note that property is just as much a fundamental right as these other rights; and indeed, they say that the "devaluation" of property in contemporary liberal theory is a major failing of those theories compared to "classical liberal" political theory.[3] The value of property in theories of this sort is that it embodies a strongly decentralized societal ethic: true independence requires individual control over resources.[4] In a society based on individual ownership, government is necessarily limited and subservient to the needs, plans and preferences of widely dispersed individual owners. Though not customarily counted a libertarian theorist, Immanuel Kant's views on property are consistent with a vision of this sort.[5]

Even in liberal theory, however, within its proper place, property is a species of right that has distinct features. As I described earlier, a major theme in IP scholarship over the past twenty years or so is that property rhetoric supports the broadening or strengthening of IP rights. From this perspective, property rhetoric might be said to be inherently libertarian in spirit: it always pushes toward a form of absolutism. For this reason, the status of IP as property has been vigorously contested. But as I said earlier, in my view this association between property and expansive rights is misguided. It is possible, in other words, to speak of IP as property while resisting the idea that IP is or ought to be intensively expansive across all its dimensions.[6] To see why, we need some background on the essential features of property.

Lawyers and legal scholars define property generally as exclusive rights to possess, use, and dispose of various assets. Under this definition, IP is recognized by legislatures and

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[2] John Rawls, A Theory of Justice 302 (1971).
[3] Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985).
[4] Robert Nozick, Anarchy, State and Utopia (1974).
[5] *See, e.g.*, Arthur Ripstein: Force and Freedom: Kant's Legal and Political Philosophy 67 (2009): 'For Kant, property in an external thing— something other than your own person— is simply the right to have that thing at your disposal [so as] to set and pursue your own ends.'); Arthur Ripstein, Authority and Coercion, 32 Phil. & Pub. Aff. 2, 9-10 (2004) ('For Kant . . . rummaging through my home or my goods for purposes that I do not share violates my ability to be the one that determines the purposes to which they will be put.'). *See* Robert P. Merges, Justifying Intellectual Property 87, 88 (2011) (Section title: 'Kant and the Community of Individual Creators'; 'The interlocking duties that result [from Kant's theory of property] constitute what I call the community of owners.').
[6] Merges, *supra* note 5, at 13 ('In writing this book I hope to . . . to write a liberal theory of intellectual property law . . . . [including] a commitment to individual ownership as a primary right, respect for third-party interests that conflict with this right, and . . . an acceptance of redistributive policies intended to remedy the structural hardships caused by individual property rights.').

courts as property. Though scholars debate whether this is good – and in particular, whether the property label pushes toward over-protection or absolutism – in the practical world of law and business, there is nothing to argue about. IP rights can be enforced in court; assigned; licensed; bequeathed; pledged as collateral; and so on. Putting aside the normative question of whether IP should be property, and focusing only on the positive question whether it actually is, there is no question about the status of IP. It walks like property, talks like property, and acts like property. And so it is.

IP has also been discussed as a species of human right in recent years.[7] Beginning with the work of Professor Lawrence Helfer, legal scholars and courts have begun to classify IP rights as among the basic property rights that are recognized in international treaties and some national legislation, particularly in Europe. A distant U.S. cousin to this strain of thought is the assimilation of IP into the strong property movement, a movement most noted for its push to expand the law of takings under the U.S. Constitution.

Theorizing about property has become an important branch of U.S. legal scholarship in the past thirty or so years, so it is noteworthy that IP has made increasing appearances in papers and books on property theory. This literature centers on analytic features and distinctions, such as decomposability (the 'bundle of rights' view) and decision-making or governance rights (prominent in so-called exclusion theory). Though the theorists working on these issues differ on many features of property, they all agree that IP is property. In recent years, numerous examples from IP law have been used to illustrate various features of the different theories. So for this group of scholars, who spend their time thinking hard about the nature of property, there is no doubt that IP is property.

From an economic point of view, property rights are understood differently. Broadly speaking, they are seen as general 'entitlements,' or legally defined starting points. They are the stuff on which economic transactions are based. As property theorist Lee Ann Fennell says: 'Transactions have entitlements as their subjects, and property law merely provides the vehicles in which tradable commodities arrive on the scene.'[8] A number of economists have concerned themselves with the specification and enforcement of

[7] *See* Peter K. Yu, The Anatomy of the Human Rights Framework for Intellectual Property, 69 SMU L. Rev. 37 (2016); Rochelle Cooper Dreyfuss, Patents and Human Rights: Where Is the Paradox?, in Intellectual Property and Human Rights: A Paradox (Willem Grosheide ed., 2010); Laurence R. Helfer, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, 49 Harv. Int'l L.J. 1, 1 (2008).

[8] Lee Anne Fennell, The Problem of Resource Access, 126 Harv. L. Rev. 1471, 1488 (2013).

property rights, but many others take the broad category of legal entitlements as more or less given, while saving their main attention to issues of contracting and transacting more generally. In recent years, various scholars have applied property rights economics to a range of issues related to IP. Topics here include the role of IP rights in encouraging firm-level specialization; the structure of IP entitlements and its effects on group labor and teamwork; and the general relationship between IP and transaction costs. Throughout the literature, economic theories of property show a good fit with how IP law works in practice. Once again, from the perspective of this branch of theory, there is no doubt that IP is a form of property.

1.2 The Basic Features of Intellectual Property as Property

Because property is such a broad concept, the discussion of why IP is property can be confusing. To simplify it, here are (in my view) the key attributes of property as it applies to IP rights:

1. It is 'good against the world' – no prior contract or other legal relationship is required to create a duty on the part of third parties to respect the right;
2. It defines uses of an asset that are under control of the owner; it demarcates what is 'in' and 'out' of the owner's ambit of authority;
3. It is broadly transferable; yet the owner retains residual rights over those aspects of the right that are not transferred. In addition, it includes a special form of quasi-transfer power, in that it permits the owner alone to decide whether and when to enforce the right.

While each of these features is contested in one way or another in the IP literature, these are the essential earmarks. In what follows I explain why I choose these attributes as the key ones.

Property bestows rights; and thus logically it creates duties. Traditionally we call the entity that holds the rights the 'owner.' But who holds the duties? Everyone else does. Everyone must respect the property right. That's what it means for it to be 'good against the world.'[9]

At a practical level, the right holder can invoke the power of the government in enforcing rights against strangers who violate them. The government, i.e., the state, gives a small dollop of its power to a right holder. This power allows (but does not require) the right

[9] This feature of IP is emphasized in Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 Chi-Kent L. Rev. 841, 844, 887 (1993).

holder/owner to go to court to seek redress against anyone who violates the right. The plaintiff in such a case pleads that it owns a right and that the defendant is violating it. There need be no other relationship or interaction between the parties. The legal relation is created by the property right and the defendant's actions with respect to it. The right in such a case can be envisioned as an 'off the shelf' contract between the owner and everyone else. An obvious implication is that if a stranger to the owner wants to make use of the asset covered by the right, that stranger knows who to deal with. The owner. The property relation concentrates power over the asset in the hands of a single legal 'focal point' – the owner. As I explained in the book Justifying Intellectual Property,

> The most important core principle of the institution of private property is this: it assigns to individual people control over individual assets. It creates a one-to-one mapping between owners and assets. I argue in this book that this one-to-one mapping is the best way to handle intangible assets, just as it is with most other assets. For me, it is this powerful logic of individual control that makes property appropriate and appealing; it has little to do with the nature of the assets in question. That is why I see IP as a perfectly plausible, and even desirable, system for administering intangible assets. The logic of decentralized control and coordination— that is, individual ownership— makes just as much sense to me for intangible assets as it does for physical assets and the other objects of traditional property law.[10]

Much of the legal and economic literature on property is built on this simple feature.[11] This is the heart of the entitlement/transaction nexus. It is the heart of the Coase Theorem, and neoclassical contracting, and it is central to transaction cost economics. In many ways large and small, property entitlements are tied up with contracting and

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[10] Robert P. Merges, Justifying Intellectual Property (2011), at 5.

[11] See, e.g. F. Scott Kieff, Property Rights and Property Rules for Commercializing Inventions, 85 Minn. L. Rev. 697 (2001); Paul J. Heald, A Transaction Costs Theory of Patent Law, 66 Ohio St. L.J. 473, 488-89, 497 (2005); Scott Kieff, Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access, 56 Emory L.J. 327 (2006); F. Scott Kieff, Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access, 56 Emory L.J. 327 (2006) (discussing 'the role of property rights as focal points in facilitating coordination among complementary users of an invention'); Paul J. Heald, Optimal Remedies for Patent Infringement: A Transactional Model, 45 Hous. L. Rev. 1165, 1170 (2008) (suggesting that the 'primary function' of patent law 'is to create a property right that reduces the cost of contracting between inventive firms and firms needing inventions'). *See generally* Stephen Yelderman, Coordination-Focused Patent Policy, 96 B.U. L. Rev. 1565 (2016).

economic efficiency. And the key to the whole apparatus is that owners are focal points; they are who you must deal with to gain access to an asset.

1.2.1 The Right to Control Uses

The essence of property is to permit individual owners to decide how to use or deploy an asset. This involves a grant from the state to the owner. The grant typically specifies in very broad terms what the owner can do with the asset. In real property, the broadest such grant is fee simple absolute, which confers broad use rights on an owner. IP law also grants broad rights, but they are usually listed in a series of expansive categorical uses. So for example, a U.S. patent gives its owner the right to 'make, use, sell, or import' any device covered by the patent's claims.[12] Copyright law in the U.S. confers a specific list of rights in 17 U.S.C § 106: the right to reproduce a work, to prepare derivative works based on it, and, in the case of certain works, to publicly perform them, display them, or to digitally perform them.[13] And U.S. trademark law gives the owner of a mark the right to sell certain classes of goods in commerce under the mark.[14]

Because IP rights are exclusive, the owner of an IP right over an asset is the only entity permitted to use it in the ways specified by the relevant statute. (This is aside from privileges explicitly carved out in favor of third parties such as members of the general public.) As in any area of law, there are edge cases. But in the main an IP right confers clear and powerful use rights on its owner. If you want to make an invention, copy a book, or sell goods using a trademark, you know who controls these activities. Ownership means control: the owner decides. In the first instance, putting aside privileges, and with no license in place, the right to use assets covered by IP rights resides with their owners. So a third party who wants to use an asset covered by an IP right knows who to contact to try to strike a deal: the IP owner.

1.2.2 The Right to Transfer

Property means that, aside from excluded uses (that is, privileges held by third parties such as members of the public), and within the proper scope of the right, it is the owner who decides what can and cannot be done with an asset. Because many of us are lawyers and/or legal scholars, we deal in 'edge cases.' That makes it hard to see how basic and important this feature is. To understand it, consider some straightforward cases.

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[12] 35 U.S.C. § 271.

[13] 17 U.S.C. § 106.

[14] Lanham Act § 32, 15 U.S.C. § 1114 (registered marks); Lanham Act § 43(a), 15 U.S.C. § 1125 (unregistered marks).

A writer has a manuscript. He, she, or an agent offers it to various book publishers. If a publisher wants it, the author can license first publication rights. This use of the asset – making a book out of a manuscript – is under the control of the author. Likewise, the inventor of a new toy (a Rubik's cube, for example; or a hollow Frisbee like an Aerobie) can offer it to various toy companies. If a company wants it, the right to manufacture and sell the toy can be licensed. Or the owner of a trademark, such as The Donut Zone for donut shops, can offer franchises in various cities across the U.S. Ownership of the mark allows the franchisor to decide on the proper licensing fee for use of the trademark in each exclusive region.

In each of these simple cases, the owner can carve out rights from the license. Perhaps the author of the manuscript wants to try e-publishing on his or her own; these rights are carved out of the publication agreement. Perhaps the toy inventor wants to pursue overseas patents; he or she can separately license the U.S. rights, and work to develop non-U.S. markets. Perhaps the Donut Zone franchisor wants to keep rights to the Detroit region for him or herself; easily done. Or the Donut Zone mark owner wants to set up mini-locations inside convenience stores and gas stations; these can be excluded from franchise agreements, and the mark licensed separately for this use. The possibilities are almost endless. Two features of IP rights make it all work: (1) they confer broad use rights, which the owner can subdivide; and (2) any rights not explicitly licensed away stay with the owner. Broad rights to use, in other words, mean that rights can be divided out yet the owner can retain broad residual use rights.[15]

1.2.3 The Special Case of Waiver

Waiver is an underappreciated aspect of property ownership. It is a practical tool that has many uses, and that makes property a highly flexible instrument. The two keys to the power of waiver are these:

1. Owners decide whether to enforce rights, and if so, when;
2. Owners can 'opt out' of property enforcement against certain classes of users, which makes property extremely flexible; it is much easier for owners to 'ratchet down' from property enforcement than it is for non-owners to 'ratchet up' (e.g. by contract) into a property-like regime.

Property rights are 'good against the world.' This creates duty on the part of everyone in a given jurisdiction to avoid using the asset covered by the rights; get permission to use

[15] This feature of property has been well-described by Henry Smith. *See* Henry E. Smith, Institutions and Indirectness in Intellectual Property, 157 U. Pa. L. Rev. 2083, 2087-2088 (2009).

it; or suffer the consequences of unauthorized use. The scope and magnitude of these duties has often been the focus of concern and debate; it is the very strength of property rights that makes many wary of assigning them in the first place.

True enough, but: this misses the crucial issue of enforcement. Property is not self-enforcing. And it is often costly to enforce. In addition, there are often good reasons to affirmatively choose not to enforce. An oft-overlooked feature of property, and IP in particular, is that owners are often quite selective about enforcing rights. For a combination of reasons including enforcement costs and strategic advantage, IP owners very frequently leave many or most of their exclusionary rights 'on the table' for others. This makes an enormous difference in the world; the effective reach of IP is often far less daunting than its apparent reach. It is a classic case of 'law on the books' differing in essential and far-reaching ways from 'law in action.'

An example from the world of platform technologies will show what I mean. Platform technologies are technical systems such as computer hardware (e.g., the Apple iPhone or Samsung Android cell phone handsets) or software (the Microsoft Windows or LINUX operating systems). They provide a common starting point for further technological development: the creation of special chipsets for the iPhone: for instance, or a cell phone application designed for use with the Google Android operating system software. For some time, scholars have understood the economic/technological forces at work in these 'platform markets'. What is of interest to IP scholars is how firms in platform markets use IP rights as strategic instruments. Some firms profit from proprietary platforms, which are covered by various IP rights. For them, exclusive IP rights exclude direct competitors, obviously. But in the case of 'allies,' companies that develop complementary technologies or content that increase the overall value of the platform 'ecosystem,' IP rights are often purposely waived.[16] So IP law permits a pattern of selective enforcement and selective waiver that is used by sophisticated platform players to advance their interests in this complex area.

[16] *See* Timothy Simcoe, 'Open Standards and Intellectual Property Rights,' in Open Innovation: Researching a New Paradigm (Henry Chesbrough, Wim Vanhaverbeke, and Joel West, eds., 2008), at 161–183; Robert P. Merges, Intellectual Property Rights and Technological Platforms (2008), Working Paper, University of Berkeley School of Law. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315522 [Accessed 14 January 2017]; Barnett, Jonathan M. Barnett, The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods.' 124 Harv. L. Rev. 1861 (2011).

Other examples include (1) 'patent pledges,' public statements of patent non-enforcement that apply to certain classes of users (such as end-users, versus competitors);[17] (2) open-source and Creative Commons contributions that include a commitment to non-enforcement against non-commercial users and contributors; and (3) longstanding non-enforcement plus promotion of widespread adoption, which can lead to implied licensing and de facto waiver over time.[18] While it would be advantageous to change the law to make it easier for owners to surrender rights in whole or in part, extensive waiver of rights is a prominent and important aspect of the IP landscape.

1.3 Limitations on Intellectual Property Rights

IP rights are surely rights, but they are limited in three ways. Specifically, IP rights are:

1. Contingent; they are subject to government processes to acquire or enforce, such as perfection, approval, maintenance, and the like;
2. Time-limited; most IP rights have specified terms, and even those that do not will usually lapse at some time;
3. Bounded in scope; the class of assets the IP rights cover is subject to boundaries drawn with more or less precision.

None of these limits is enough to disqualify IP from being property. But altogether they impose significant restrictions on the strength or power of an IP right.

2. What Kind of Rights? Hohfeld and Intellectual Property

So far, I have tried to establish two main points. IP rights are rights, but this does not and should not indicate a blind absolutism. And, though IP rights are property rights, property is an expansive and flexible concept. So again, no argument for absolutism.

I move here from this preliminary posture, to a fuller statement. If IP rights are rights, what kind of rights are they? What are their primary features and characteristics? For answers, we turn to the locus classicus for the systematic taxonomy of legal rights, in the work of Wesley Newcombe Hohfeld. His Fundamental Legal Conceptions as Applied in Judicial Reasoning described legal rights in a series of four paired concepts. These dissect

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[17] *See* Jorge L. Contreras, Patent Pledges: Between the Public Domain and Market Exclusivity, 2015 Mich. St. L. Rev. 787 (2015); Robert P. Merges and Jeffrey Kuhn, An Estoppel Doctrine for Patented Standards, 97 Cal. L. Rev. 1 (2009).

[18] *See* Robert P. Merges, To Waive and Waive Not: Property and Flexibility in the Digital Era, 34 Colum. J. L. & the Arts 113 (2011).

legal rights into finer classifications, and show (by opposition) what kinds of burdens or obligations are created by each type of right. It makes sense to start with these when talking about any rights, including IP rights.

Here are Hohfeld's pairs. They are stated in terms of the holder of an entitlement first; and then the corresponding legal position, as experienced by those against whom the entitlement applies:

Claim Right – Duty

Liberty Right/Privilege – No-claim

Power/Authority – Liability

Immunity – Disability

Because these are abstract concepts, examples are always helpful in understanding what they mean. So I will take each entitlement pair in sequence.

2.1 Claim Right/Duty

In real property, a classic 'claim right' is the right to keep people off your land, or to keep them from harming your land.[19] This claim right creates in others (third parties) a correlative duty to keep off the land and not to cause it harm.

In IP law, the primary claim right boils down to the notion of an exclusive right. To exclude means to keep out, to prevent entry. There are two key elements to this claim right in IP: the scope of the right, and the remedy available to the right holder to enforce the right.

Scope in IP is a complex topic. Geographic metaphors are common, particularly in patent law, where the 'metes and bounds' trope is relentlessly used to explain patent claims. In recent years some influential scholarship has challenged the effectiveness of notice in patent law.[20] Claims are so unclear, and there are so many of them, that 'notice failure' is a serious problem. Potential infringers simply cannot identify and pre-clear all of the patent rights they may violate. This is especially true when potential infringers are manufacturers of complex, multi-component products that may touch on hundreds or

[19] The examples that follow are drawn from Hohfeld, at 746-47.

[20] Peter S. Menell, Michael J. Meurer, Notice Failure and Notice Externalities, 5 J. Legal Analysis 1, 9-10, 18 (2013).

thousands of patents. And, it should be pointed out, notice failure is not a ubiquitous feature in patent-intensive industries. 'Freedom to operate' studies are extremely common in the life sciences industries such as biotechnology and medical devices. These studies routinely identify all relevant patents that might interfere with the introduction of a new product. Investors rely heavily on the accuracy of these studies; before they invest, they require assurance that the company they are investing in will not be slammed with litigation just after it introduces a new product on the market. At a practical level, then, notice seems to work well in these industries.

To some extent the idea of notice failure is predicated on the need for pre-clearance. But where clearance is not possible, such as with complex multi-component products, potential infringers have taken the approach of product introduction first, patent clearance (when necessary) second. So in these industries the burden falls on right holders to identify potential infringers. This is ex post clearance as opposed to ex ante clearance. This reflects the reality that IP enforcement is not automatic; patent and copyright owners must actively seek out companies that may be infringing. The incentive to perform this sort of search depends on the economics of IP litigation. Given current trends, in a complex multi-component product market, some fair number of patent and copyright infringement lawsuits can be expected for any successful product. The mobile phone and computer software industries are excellent examples. Because a certain amount of litigation is expected, but complete pre-clearance is impossible, producer companies in these industries engage in two forms of risk reduction: (1) for patents, they preemptively buy up potentially troublesome patents – those that others might use to sue them;[21] and (2) for patents and copyrights, they buy various forms of litigation insurance to lower the systemic costs of infringement liability.[22]

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[21] See Scott Graham, With Rockstar-RPX Deal, 'Tis the Season for Patent Peace, The Recorder (Dec. 23, 2014), http://www.rpxcorp.com/wp-content/uploads/sites/2/2015/03/Recorder_Rockstar.pdf (describing transaction in which many patents formerly owned by now-defunct company Northern Telecomm were purchased by RPX, Inc., a consortium of major manufacturing and service companies such as Microsoft and Google; the RPX business model joins member companies together with the explicit purpose of pre-emptively buying up patents that might otherwise be used to sue member companies). *See generally* Michael J. Burstein, Patent Markets: A Framework for Evaluation, 47 Ariz. St. L.J. 507 (2015); Michael Risch, Licensing Acquired Patents, 21 Geo. Mason L. Rev. 979 (2014); Andrei Hagiu & David B. Yoffie, The New Patent Intermediaries: Platforms, Defensive Aggregators, and Super-Aggregators, 27 J. ECON. PERSP. 45 (2013).

[22] *See, e.g.*, Intellectual Property Insurance Services Corporation, http://www.patentinsuranceonline.com (describing IP insurance products and

Pre-emptive patent buying to some extent gives the lie to the notice failure concern. If companies could not determine potential instances of infringement, they would not know which patents to buy up. At the same time, companies looking for pre-emptive purchases often buy in bulk.[23] This signals that it may be difficult to identify with precision specific problem patents. Certain metrics or parameters are identified, and then a buy-up program is implemented. Notice in these cases is not completely lacking, but it falls short of the absolute precision usually associated with urban land boundaries and other valuable real property holdings.

Litigation insurance is another solution to fuzzy patent boundaries. The idea here, as with any insurance, is that there are known risk factors, based on overall experience ratings. These data, accumulated over time, provide a baseline for pricing insurance. As with adverse weather, where it is impossible to predict a specific tornado or hurricane, patent litigation is viewed as a systemic risk. When a particular patent litigation plaintiff appears, the insurance policy kicks in to help pay for the litigation and potential settlement/damages that may result. Thus as with patent buy-ups, insurance helps mitigate the risks posed by notice failure in the patent space. In a limited sense, one might say, they are substitute market mechanisms that help economic actors adjust to notice problems.

Of course, there is another way to view the need for complex patent buying and insurance schemes. Rather than seeing this as evidence of a sophisticated adjustment to property rights in a complex environment, it might instead represent proof that something is wrong with the property environment to begin with. It might, as the notice failure literature says, represent a complete 'failure' of the property/notice model. Under this view, if the

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services); id., at http://www.patentinsuranceonline.com/wp-content/uploads/2016/01/Software-Data-Case-Study-Defense.pdf (describing case study in the software industry, including policy limits, client premium, claim example (successful litigation defense), etc.); Donaldson, Michael C. 2008. *Clearance & Copyright: Everything You Need to Know for Film & Television* (2008) (copyright infringement, or 'errors and omissions' (E&O) policies). *See generally* Lisa A. Small, Offensive and Defensive Insurance Coverage for Patent Infringement Litigation: Who Will Pay?, 16 Cardozo Arts & Ent. L.J. 707 (1998). *But see* Peter S. Menell, Michael J. Meurer, Notice Failure and Notice Externalities, 5 J. Legal Analysis 1, 26 (2013) (claiming that IP insurance is 'almost nonexistent').

[23] *See* James M. Rice, The Defensive Patent Playbook, 30 Berkeley Tech. L.J. 725 (2015).

institution of property were working as it should, there would be no need for insurance and patent buying schemes. The market may have provided a solution (as it often does); but this, it can be argued, does not mean all is well. There are all sorts of cases where a private market solution arises out of dysfunction. Private security fills in for effective policing; private schools or tutors fill in for effective public education; oxygen tank rentals are available where effective air quality controls are lacking. And so on. None of these market solutions indicate that all is well. Perhaps this is so with property rights in industries selling complex, multi-component products?

Then again, perhaps not. Notice failure points toward pathology in a property system only if the ability to pre-clear is considered an essential attribute of property. But as I have argued at several points here, essentialism with respect to property rights is a dangerous practice. Experience shows that where practical constraints put pressure on classical arrangements, property law adapts. And the resulting structure of rights and practices still qualify as property – despite the adaptations. A good example is the way property law responds to land rights in cattle country. Where cattle ranching predominates, individual landholders are required to 'fence out' roaming cattle.[24] Their fee simple absolute entitlement is modified, in effect, by the need to accommodate practical realities of the economic context behind their landholdings. But when cattle ranching becomes less common, and farming predominates, the legal rule changes, and cattle owners are required to 'fence in' their cattle.[25]

The 'fencing out' rule might be seen as a violation of basic property norms. After all, the right to be free of trespass is a fundamental feature of the claim-right aspect of property ownership. In the same way, the inability to clearly identify all relevant property boundaries in advance might be seen as a violation of basic property norms. Yet in both cases property law adjusts to the situation. For land owners in cattle country, fencing out is required, in effect modifying the classical model of property ownership through a slight adjustment in the structure of the entitlement. The right to exclude, in this limited case, becomes a duty to exclude, at least if the owner wants to prevent harm.

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[24] The formal legal rule is explained in Richard A. Posner, Economic Analysis of Law 60 (5th ed. 1998) (explaining the preference for fencing in versus fencing out in terms of the ratio of cattle to crops). Other scholars have noted, however, that in tight-knit communities the formal rule is often replaced with an informal norm, which is usually a 'fencing in' as opposed to a 'fencing out' norm. *See* Robert C. Ellickson, Order Without Law 52-81 (1991); Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 Yale L.J. 357, 388-89 (2001).

[25] Posner, supra note 24, at 60.

In the same way, in complex multi-component product industries, pre-clearance may not be possible. And so property rules adjust: the burden of enforcement is on patent owners to enforce their rights, and the failure to pre-clear rights ought not and generally is not held against someone who undertakes economic activity that ends up infringing. Of course, remedies must be applied wisely and with sensitivity in the case of multi-component patent-intensive industries. Otherwise the lack of notice, coupled with extensive enforcement, could end up taxing economic activity so heavily that market entry and innovation are stifled. While this remains a concern, the practical point to notice is that market entry and innovation remain robust in these industries, at least so far. Large-scale software, mobile phones (hardware and content), and consumer electronics are all examples. Pre-clearance is impossible, and patent enforcement has been extensive, but the industries remain – so far anyway – robustly innovative.

2.2 Privilege/No Claim

It is also standard property law that the owner of a fee simple absolute interest in land has the right to enter or not enter the land, develop or not develop it, even to neglect or harm it in some cases. These are liberty rights or privileges, in the Hohfeldian lexicon. Third parties cannot prevent behaviors that are protected by a privilege, so we say that these parties have 'no claim' over the privileges of the owner.

The liberty rights or privileges of IP owners are in some ways quite limited. For example, a trademark owner that does not continue to sell products under the protected mark is in danger of losing legal rights. In a similar vein, IP owners are subject to restrictive doctrines with respect to laches and implied licenses. In real property, it can often take a significant period of time to lose one's interest in a piece of land (e.g., under adverse possession); but it is unsafe to neglect an IP right, or to refuse to enforce it, for even a few years.[26] And complete neglect, culminating in destruction, may have other consequences as well. Because a copyrighted work may be subject to a parallel set of 'moral rights' that remain with the work's creator, even an outright owner of the copyright who has taken legitimate title to the work cannot destroy it or neglect it in certain other ways without being subject to legal consequences. Finally, in many areas of

[26] Case in point: an enterprising bar owner in North Dakota seized on a lapsed trademark on 'Geographic Center of North America,' that had been registered by a nearby town until 2009, and in 2016 assumed ownership of the mark. *See* Jukian Robinson, 'The center of North America has MOVED: Cunning bar owner in North Dakota steals title from a neighboring town and claims it for his own community,' Daily Mail, Dec. 19, 2016, avail. at http://www.dailymail.co.uk/news/article-4047868/The-center-North-America-MOVED-Cunning-bar-owner-North-Dakota-steals-title-neighboring-town-claims-community.html.

technology a patent does not confer an absolute right to manufacture products and sell them on the market. Other, related patents may cover parts of the same technology, eliminating a patentee's liberty to deploy its own patent. Or parallel regulatory regimes (e.g., FDA approval in patent law) may well have to be satisfied in order to take affirmative steps to commercialize products covered by a patent. Even the right to ignore an IP right, to let it languish without using it in any way, is subject to restrictions. Various third parties might have plausible claims to an unused right, such as under the 'working' or compulsory licensing requirements in some countries, or 'fair use' claims in copyright in some cases.[27]

The limitations of liberty rights with respect to IP are also evident in a species of antitrust case. A patentee may condition the purchase of a patented item on an additional purchase, for example an input into a patented machine, an associated component, or even an add-on service such as a repair contract. Courts have consistently evaluated licensing agreements such as these – called 'tie-ins' – under the antitrust rule of reason. When a patentee appears to be illegitimately leveraging its market power in the patented good to promote sales of the unpatented item, the agreement will be condemned.

To reach this result, courts early on confronted an argument based squarely on liberty rights. No less an authority than Justice Oliver Wendell Holmes had argued that, because the patentee has the right to refuse access to anyone, he or she necessarily has the right to grant access on whatever restrictive terms are desired. So the right to keep an invention to oneself justifies the right to license the invention on condition that its purchase be tied to purchase of another item. As Holmes said:

> I suppose that a patentee has no less property in his patented machine than any other owner, and that, in addition to keeping the machine to himself, the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use. Continental Paper Bag Co. v. Eastern Paper Bag Co. 210 U.S. 405 [1908]. So much being undisputed, I cannot understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it. Generally speaking, the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event. Non debit cui plus licet, quod minus est non licere. D. 50, 17, 21 [Ulpian].

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[27] *See generally* Oskar Liivak & Eduardo Peñalver, The Right Not to Use in Property and Patent Law, 98 Cornell L. Rev. 1437, 1440-43 (2013).

> No doubt this principle might be limited or excluded in cases where the condition tends to bring about a state of things that there is a predominant public interest to prevent. But there is no predominant public interest to prevent a patented teapot or film feeder from being kept from the public, because, as I have said, the patentee may keep them tied up at will while his patent lasts. Neither is there any such interest to prevent the purchase of the tea or films that is made the condition of the use of the machine. The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which of course it is not, and more accurately as a possible domination to be established by such means. But the domination is one only to the extent of the desire for the teapot or film feeder, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I cannot see, in allowing him the right to do so, anything more than an ordinary incident of ownership, or, at most, a consequence of the Paper Bag Case, on which, as it seems to me, this case ought to turn.[28]

The Latin phrase cited by Holmes, which is taken from a Roman Digest entry attributed to the great jurist Ulpian, translates roughly as 'He to whom the greater is lawful ought not to be precluded from the lesser as unlawful.' It is thus one form of the general maxim, 'the greater includes the lesser,' which was a frequent theme in Justice Holmes's opinions.[29] The difficulty with the argument is that it is often false. The law frequently permits a greater power but denies lesser ones.[30] Put simply, IP rights carry reasonably robust claim-rights, but they have significant limitations when it comes to liberty rights.

2.3 Power/Liability

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[28] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 519-520 (1917) (Holmes, J., dissenting).

[29] See, e.g., Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892) (Holmes, J).

[30] *See* See, e.g., 44 Liquormart v. Rhode Island, 517 U.S. 484, 511-12 & n.20 (1996) (collecting cases where the greater power does not include the lesser); Einer Richard Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev . 668 , 708 (1991) (noting that the logical claim that the greater power must include the lesser 'lacks force' in antitrust analysis); Donald F. Turner, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L.J. 267, 276 (1966) ('sound answers to the problems the [tie-in] cases posed cannot be reached by . . . metaphysical assertions that the right to exclude totally necessarily embraces the right to exclude partially') (citations omitted); Louis Kaplow, Extension of Monopoly Through Leverage, 85 Colum. L. Rev.515 (1985) (similar).

The third Hohfeldian entitlement is a power or legal authority. Broadly, this means the right to dispose of an entitlement. The most important manifestation of a power is the right to alienate all or part of the interest in an entitlement such as land. The owner has 'authority' to sell or lease, in other words, whereas others do not. Third parties are in fact subject to any change in ownership effected by an owner, and so these parties are said to experience a 'liability' when the owner exercises its power. Third parties are, in other words, 'liable' to the exercise of the owner's power.

IP rights come with significant powers. The power to alienate, and to grant rights to third parties generally, are perhaps the most important ones. The key to this type of right is the exclusive authority to control access to the domain carved out by the claim-right. At the practical level, this is what permits assignment and licensing. One way to think about this aspect of property rights is as an exclusive 'governance zone,' which defines a set of behaviors that only a right owner may authorize. This provides the foundation for much of the theorizing about property (including IP) associated with the work of Professors Henry Smith and Thomas Merrill. They have shown that the right to exclude allocates decision rights to a single entity, who has sole authority to determine which activities are permitted within the zone of exclusion. This is contrasted, in their writings, with more regulatory systems of control under which society-level rules determine what may and may not be done with a certain asset.

In the Smith & Merrill theory, the main advantage of exclusionary rights is that it gives individual owners an incentive to gather information about the best and most valuable use of an asset. In this way, exclusionary zones associated with individual owners are justified on the basis of information costs. Owners control access and use, which gives them an incentive to maximize the value of the owned asset. And third parties need not consult complex regulations concerning what may and may not be done with an asset. This would require gathering too much information. The only information a third party needs is, who is the owner? With that information a third party can propose access and use schemes to the owner, who is in the best position to determine if those schemes make sense. In Hohfeldian terms, it is the authority (or power) of the owner that makes this all work.

Fourth and finally is the right to be protected from third parties with respect to some activities, called an immunity. An owner of land, for example, is immune to the efforts of a third party to sell or lease the owner's land, or to prohibit someone from entering the land, where such prohibition is against the wishes of the owner. Third parties are, correlatively, 'disabled' from exercising these rights and so are said to be subject to a disability.

2.4 Immunity/Disability

Immunities, the fourth type of Hohfeldian right, are just the flip side of powers. An owner has immunity from third party actions. Immunities mean no third party has any authority over an entitlement owned by someone else. Thus no third party can legally alienate or license an IP right without permission of the owner. Because a right holder has power (or authority) over an IP right, that owner is immune from purported power-assertions by third parties. One important result of this mirror-image structure is that third parties who deal with an owner cannot be frustrated by inconsistent transfers made by other purported owners. A potential exclusive licensee who is dealing with an IP owner is confident in knowing that no other license of the relevant IP right may be executed by a third party. These rules are eminently sensible, though in some cases (such as co-ownership) there are twists that significantly undermine the simple structure of authority/power – immunity rights.

It is important to distinguish immunities with respect to individual property rights from a broader sense of immunity. As described earlier in the section on privileges, IP rights in general do not carry with them broad rights to act in disregard of third party claims. The owner of a patent, for example, can be assured that no third party may grant a license under the owner's own patent. And she may be assured that a third party cannot otherwise encumber the patent (by pledging it as collateral or the like). But the IP right provides no assurance that she is immune from the claims of owners of other patents. Ownership of Patent A, in other words, provides no immunity whatsoever over the actions of one who owns Patent B. So if both patents, A and B, would be infringed by making or selling some product, A will need clearance from B and vice versa if she wants to sell the product. Immunity is related specifically and solely to a single IP right; it does not apply when it comes to other, related rights. And because of the interlocking and overlapping nature of IP rights, this is a significant limitation.

2.5 Hohfeld: Conclusion

How does this analysis help us understand IP rights? In a good number of ways. Most importantly, it cordons off the basic exclusionary right – a classic claim-right – from related but quite distinct legal conceptions. IP cases, particularly in patent law, often say that the right to exclude is the essence of property. This may or may not be so; essentialism in such a flexible regime as property can be a dangerous practice. But what is most definitely not so is that this claim-right automatically or inherently or organically extends to a strong set of adjacent rights. That is demonstrably not the case with respect to IP rights.

Hohfeld's analytic pairs are quite helpful here in demarcating the specifics of IP entitlements. They are strong with respect to certain claim-rights, and moderately strong in conferring Hohfeldian powers; but they are quite weak when it comes to privileges and immunities.

3. Obstacles to Conceiving Intellectual Property as Property

Despite the common sense case for IP as property, three obstacles stand in the way: (1) IP rights are issued or recognized by the government for them to be enforced; the necessity of obtaining or perfecting IP makes it seem to some people as if IP is not a real right; the need for government approval makes them seem less solid and more a matter of governmental discretion; (2) IP rights are not always everywhere backed by an injunctive remedy; especially with respect to U.S. patents after the highly influential eBay decision, this leads some to argue that IP is no longer so assuredly a 'right to exclude,' which they say makes it less like property; and (3) because IP plays a role in permitting or discouraging entry into economic markets, it has been described (particularly by influential IP scholar Professor Mark Lemley) as more akin to regulation than real property.

I consider each objection in turn.

3.1 Intellectual Property Acquisition and Misunderstandings About What it Means to be a Right

Most confusion about why IP rights should not be considered rights have to do with absolutism. When someone uses the language of rights, it has a certain connotation: an unassailable, impregnable entitlement. An entitlement that cannot be offset, overridden or countermanded. A final and complete claim.

This is wrong as a general matter, as I show throughout this Chapter. And so it is wrong with respect to the subject matter of IP.

For those who adopt this reasoning, however, one of the key proof points is that, to acquire IP rights, one must often follow certain government-mandated procedures. This is apparent with respect to patents, and true also of trademarks in many (but not all) cases. Copyright, on the other hand, famously 'subsists' from the moment of creation or material fixation; but even here, to enforce one's rights in the U.S. one must register the copyright. In these and other ways, the law interposes a set of ministerial steps or requirements on the would-be holder of an IP right. How can it be a right, the question goes, if you have to satisfy a bunch of government requirements? The language of rights

implies not an inchoate claim that must be perfected, but an absolute entitlement. The presence of ministerial requirements appears to undercut the status of a right.

This point is sometimes supported with reference to John Locke's theory of property rights. For Locke, property rights are 'pre-political'. They are natural and ethically mandated. Property rights, derived from the ineluctable claim to one's labor, belong first to people, who may choose to come together to form a civil society. The very essence of such a society is in fact the defense of these property rights. Property precedes the state; it is the fundamentalis ratio of the state, its founding principle.

In such a theory, the state does not ratify or approve of property claims. If it did – if property were not valid without state approval – the natural order would be upended. That which preceded the state would be subject to the whim and discretion of the state. A Lockean absurdity.[31]

Despite its appeal, this argument carries no water. Locke recognized the important distinction between the founding rationale for the state and the workaday operations of civil society, once established. The founding story is a conceptual narrative, written as a critique of the 'divine right' theory of monarchical sovereignty. Locke was arguing against the notion that the king or queen has initial title to all the land in a kingdom (by virtue of being enthroned with acquiescence from a virtuous Deity). For Locke, the monarch serves at the behest of the citizens of the kingdom, put in his or her exalted position to defend property claims that conceptually anyway predate the choice of the monarch.

In operation, however, the very legitimacy the state derives from its founding allows it to place conditions and requirements on all sorts of activities of its citizens. Land ownership is one such activity. Owners can be required to register deeds, to maintain current records of ownership, and of course to pay taxes to support the legitimate state whose protection is needed to secure property claims. In short, ministerial acts to perfect, maintain, and enforce rights are perfectly consistent with Locke. Arguments to the contrary misunderstand the nature of a 'prepolitical' right, and underestimate the importance of the concept of civil society in Lockean political theory.

As with land, so too with IP rights. The need to apply for, secure, and maintain an IP right in no way undermines its status as a right. Dependence on the state apparatus to manage a complex system of interlocking and sometimes overlapping rights says nothing

[31] Mark A. Lemley, Faith-Based Intellectual Property, 62 UCLA L. Rev. 1328, 1338 (2015) ('they believe in IP as an end in itself--that IP is some kind of prepolitical right to which inventors and creators are entitled').

about the nature of those rights. Failure to pay one's property taxes may result in seizure of one's land. This does not mean that one does not own it. It does not mean that this ownership is not a right. It just means that this right is subject to duties and affirmative acts required to maintain one's right in good standing.

But what about patents, or registration of a U.S. federal trademark? Here the ministerial acts required to secure an enforceable IP right go beyond registering and maintaining the right. One must first establish, to the satisfaction of agents of the state, that one deserves the IP right in the first place. How can you call it a right if you have to prove you deserve it to get it? Isn't a right something you just deserve, without more, without proving anything?

Not necessarily. The act of establishing that an invention meets the statutory requirements for patentability, or that a trademark may be properly registered, does not undermine the case for patents and trademarks as rights. A complete statement of these issues is this: one has a right to a patent for a fully patentable invention, as long as one follows proper procedures for securing the patent. One has a right to a trademark for a sign that is unique and distinctive (within a given class of goods) so long as one follows procedures and secures the right in the appropriate ministerial way. No one has a right to a patent for an unpatentable invention, or an invalid trademark, but given stated requirements for patentability and proper trademark status, one has a valid claim to an IP right for subject matter that meets those requirements.

3.2 What, No Automatic Injunction? That's Not Property!

Particularly after the eBay decision in 2006, it was proclaimed in some quarters that if patents had ever been property, they were no longer.[32] The point was simple: property equals the right to exclude; the hammer blow from this rule has always been the availability of an injunction, under which a court orders a party to stay out of the technology space claimed in a patent; the elimination of injunctions as an automatic remedy in patent cases removes the hammer in at least some cases; and so therefore patents cannot be considered property rights anymore. This was a popular argument not only among those who favored a regulatory or relatively 'weak' version of patents, but

[32] *See, e.g.*, Richard A. Epstein, The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary, 62 Stan. L. Rev. 455, 494 (2010) ('Nothing in the traditional principles of equity requires that radical revision of the right to exclude that *eBay* seems to invite'). *See also* Bernard Chao, Causation and Harm in A Multicomponent World, 164 U. Pa. L. Rev. Online 61, 73 (2016) ('Richard Epstein is a leading thinker in the 'patents are property' camp').

also by staunch defenders of patent rights – who claimed that eBay is an aberration that needs to be fixed.

But this is wrong. Even in the U.S. after eBay, most patent and copyright owners who win infringement suits receive a permanent injunction. The injunction rate did not drop to zero after eBay; it dropped to roughly 75%.[33] And for many industries and companies, injunctions continue to be essentially automatic. What eBay did, in effect, was to weaken the strength of the property right only in certain cases where the traditional remedy was causing serious economic damage.

Companies whose sole function is to acquire and litigate patents have come to be known as Patent Assertion Entities or PAEs. PAEs tend to obtain and assert patents in certain technology fields. The chief characteristic of these technologies is that they are found in complex, multi-component products that are often covered by hundreds or even thousands of patents. An injunction for infringing a single patent in this context causes serious problems, especially given that manufacturing companies have to freeze their product designs long before learning of most patents. The resulting dynamic, known as 'holdup' or 'holdout'[34] takes shape when an injunction issues; the property right over a single component allows the patent holder to extract much more value from the infringer than is realistically attributable to the intrinsic worth of the individual patent. Injunctions, in other words, confer 'undue leverage' on patent holders in this situation. PAEs with single-component patents are far removed from the fundamental purpose of patents – to encourage creation and dissemination of valuable technologies. And so, because an injunction seriously overcompensates patent holders in this situation, courts post-eBay now routinely deny an injunctive remedy.[35]

The usual contrast here is with real property, where it is presumed that injunctive relief is absolutely automatic in cases of trespass and the like. The truth is otherwise: there are common and fairly frequent cases involving real property rights in which an injunction is

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[33] Christopher B. Seaman, Permanent Injunctions in Patent Litigation After Ebay: An Empirical Study, 101 Iowa L. Rev. 1949, 1983 (2016). It should be noted that, contrary to my analysis, Professor Seaman sees *eBay* as a major shift in the patent system away from a property entitlement: '[T]he application of this four-factor test [in *eBay*] represents a significant shift away from property rules toward liability rules for the enforcement of patent rights.' Id., at 1962.

[34] *See* Sean M. Collins & R. Mark Isaac, Holdout: Existence, Information, and Contingent Contracting, 55 J.L. & Econ. 793 (2012).

[35] *See* Robert P. Merges, The Trouble With Trolls, 24 Berkeley Tech. L.J. 1583 (2009).

not issued in favor of the property owner.[36] We will review a few of the well-known instances here, to illustrate. The chief point to notice as we do so is this: in each case, violation of a small magnitude right would, if met with injunctive relief, result in a legal remedy worth a huge amount of money. The reward, in other words, is highly disproportional to the magnitude of the violation. This is precisely the situation in which injunctions are denied in patent cases. It just so happens that, at least under conditions prevalent between 2000 or so and 2017, this small right/huge reward scenario was more common in patent law than in real property cases. But the fact that this situation was more common with respect to patent rights than real property rights does not in any way undermine the status of patents as property. This is an empirical regularity – and perhaps a transient one, if the many measures of patent reform have the desired effect of eliminating or shrinking the small right/large reward dynamic. Regardless of how well these changes work, however, instances where an injunction gives undue leverage to a property owner do not change the nature of that owner's right. These instances produce an exception to the standard remedy given to a property owner; they do not transmute the owner's interest into something other than property.

Copyright injunctions have always been a bit more complicated. This is because an order that prevents an infringer from publishing or disseminating a copyrighted work runs headlong into first amendment concerns.[37] When a court stops someone from speaking in any way, even to protect copyright, defenders of civil liberties sit up and take notice. Ultimately this leads to discretion on the part of district courts when it comes to granting or denying injunctions, particularly preliminary injunctions. Even so, there is widespread consensus that injunctions are generally available for copyright infringement, and that this means copyright is protected as a property right.[38]

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[36] Indeed, property theorist Carol Rose has described liability rules, under the classic Calabresi-Melamed framework, as simply a modified version of property rule entitlements. *See* Carol M. Rose, The Shadow of The Cathedral, 106 Yale L.J. 2175, 2179 (1997) (observing that a liability rule creates a 'property right subject to an option (or easement)'--that is, a 'PRSTO (or PRSTE)'). The restatement of liability rule entitlements in the terms of real property ownership (property subject to an easement) shows that (1) real property ownership is not absolute, and (2) that post-*eBay* patent 'easements' (in the form of continuing royalties when injunctions are denied) do not undermine the status of patents as property rights.

[37] Mark A. Lemley and Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147-242 (1998).

[38] Jiarui Liu, Copyright Injunctions After eBay: an Empirical Study, 16 Lewis & Clark L. Rev. 215 (2012) (finding that injunctions are typically granted when copyright infringement is found); Michael E. Kenneally, Commandeering Copyright, 87 Notre Dame L. Rev. 1179, 1220 (2012) ('In copyright law, property rules predominate').

So IP law in general provides an injunctive remedy. Granted, this is subject to some limitations and exceptions. Yet that is not enough to remove IP from the category of property. The reason is that even in other situations where there is widespread agreement that assets are covered by property rights, injunctions are not always available. The 'canonical' instances of real and personal property provide ample evidence of rules that deny strong injunctive protection in all cases. If these assets are nonetheless recognized as classic subjects of property law, then IP is no different. Property does not require nor demand an automatic and inflexible injunctive remedy in all cases and all situations. Again, property is more flexible than that. To see this, consider some examples.

1. Even an injunction is not as absolute it sounds; with the normal remedy of civil contempt for violating an injunction, a party can 'buy' its way out of the injunctive remedy, though the price may be stiff.[39]
2. Encroachment: An adjacent landowner who innocently builds a valuable structure that oversteps an owner's property line will not be ordered to tear down the building or otherwise be enjoined from using it, if such an order would impose undue hardship on the adjacent landowner.[40]

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[39] John M. Golden, Injunctions as More (or Less) than 'Off Switches': Patent-Infringement Injunctions' Scope, 90 Tex. L. Rev. 1399, 1412-13 (2012) ('When any threat of being found in contempt is realistically limited to a threat of civil contempt . . . [the] risk of being found in contempt can essentially amount to no more than a risk of being subjected to heightened but still limited monetary sanctions').

[40] *See, e.g.*, Amkco, Co. v. Welborn, 21 P.3d 24, 28 (N.M. 2001) (Hardship to adjoining landowner by truck stop's encroachment of 58 feet onto his land, which constituted roughly nine percent of tract, did not compel issuance of injunction requiring removal of encroachment, where adjoining landowner provided no evidence that he suffered hardship, and requiring removal would cost truck stop operators $188,837 cost of improvements, $107,687 in lost revenue, and would make $1.25 million project unviable.); Proctor v. Huntington, 238 P.3d 1117, 1123 (Wash. 2010) (en banc) ('[W]e recognize the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach'). *Cf*. Parry v. Murphy, 79 A.D.3d 713, 913 N.Y.S.2d 285 (2d Dep't 2010) (underground pipeline: plaintiff landowner is not entitled to an injunction; he did not show that he would suffer irreparable harm from presence of pipeline that substantially outweighed injury which injunctive relief would cause defendants; instead, award of damages, measured as difference between value of property with and without encroachment, would adequately compensate landowner.) The rule is otherwise when the encroachment is willful or intentional. *See, e.g.*, Culbertson v. Bd. of Cnty. Comm'rs, 44 P.3d 642, 658 (Utah 2001)

3. Trespass: damages are awarded for one-time trespass and in other cases where the trespass is not shown to cause irreparable injury to the landowner.[41]
4. Adverse possession, which has been defined as 'efficient trespass'.[42]
5. Conversion of chattels: Damages are routinely awarded in the amount of the full value of the converted item.[43]

To return to the IP context: Non-injunctive remedies are substituted routinely in certain well-recognized situations. This does not mean the assets in these cases are no longer the

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('"[W]here the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may require its restoration without regard for the relative inconveniences or hardships which may result...."' (quoting Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1259 (Utah 1975))). *See generally* Mark P. Gergen et. al., The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions, 112 Colum. L. Rev. 203 (2012).

[41] *See, e.g.*, Donovan v. Kissena Park Corp., 181 App. Div. 737, 168 N.Y. Supp. 1035 (1918) (equity jurisdiction to restrain a trespass, although unquestioned, is sparingly used; trespass alone does not suffice to invoke it; equity rests in the probability of irreparable injury; and the rule still prevails that equity will interfere only in cases where the remedy at law is inadequate). *Cf.* Wing Ming Properties (U.S.A.) Ltd. v. Mott Operating Corp., 79 N.Y.2d 1021, 1023, 594 N.E.2d 921, 922 (1992) (de minimis incursion into air space owned by plaintiff did not warrant an injunction). *See generally* Richard A. Epstein, Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres, 32 Val. U. L. Rev. 833, 840 (1998) ('The traditional view is that trespass is a wrong; all that is then left for the court to decide is whether damages, injunctions, or self-help in defense of property is appropriate under the circumstances, just as the conventional analysis has it.')

[42] Lee Anne Fennell, Efficient Trespass: The Case for 'Bad Faith' Adverse Possession, 100 Nw. U. L. Rev. 1037, 1038 (2006) ('adverse possession can best be understood as a doctrine of efficient trespass'). *See also* Thomas W. Merrill, Property Rules, Liability Rules and Adverse Possession, 79 Nw. U. L. Rev. 1122 (1985).

[43] *See, e.g.*, Clark v. Allied Assocs., 477 So. 2d 656, 657 (Fla. Dist. Ct. App. 1985) ('Equity will not injunctively command return of personal property unless it is of peculiar value and character and unless its loss or retention by one not entitled to it cannot be fully compensated in damages'). *See generally* Richard A. Epstein, Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres, 32 Val. U. L. Rev. 833, 847 (1998) ('The standard measure of damages for conversion [is] the chattel's full value'. Epstein goes on to describe Restatement of Torts factors that may mitigate the award of damages, such as a voluntary return of the converted item to its rightful owner' Id., at 846-47 (footnotes omitted).

subject of property rights.[44] It just means the remedy is adjusted to take account of various factors that mitigate the desirability of the normal injunctive remedy. The fact that the frequency of these well-recognized cases in real property may be lower than the current frequency of PAE litigation does not mean that patents are any less property than the rights at issue in these other cases. Scottish legal philosopher Professor Neil MacCormick admitted this possibility in an essay on rights and discretion, where he describes 'a mixed system of objectively stated rights whose vesting conditions or operative contents are so vaguely or evaluatively stated as to introduce quite extensive discretion at the remedial level of judicial cognition and enforcement.'[45] MacCormick distinguishes the 'first level,' the one at which rights are defined, from the 'second,' at which courts are sometimes vested with discretion about the specific scope and remedial effects of those rights.[46]

Unlike Professor Christopher Seaman, I do not see this is as the end of property for patents in general, or even for the patents in technology fields favored by PAEs.[47] The adjustment of the remedy in these cases (1) applies to a minority of patents, where (2) the patents and their deployment context meet specific criteria. The application of eBay to copyrights and trademarks includes similar limiting principles. No property right – even the canonical fee simple absolute in land – is absolute. If encroachment and the classic 'forced sale' remedy do not take away property status for land, then eBay and its progeny do not take away property status for IP rights.

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[44] Professor Shyamkrishna Balganesh has a different view of all this, one worth noting. The point of exclusion, he says, never devolved to a simple right to enjoin. Shyamkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 Harv. J.L. & Pub. Pol'y 593 (2008). Exclusion is best defined, Balganesh argues, in terms of the duty it imposes on third parties to stay away from a resource marked as owned by another. Balganesh (2008), at 623. Exclusivity, in this view, is more like a posture encoded in the law than a firm statement of remedial consequences. Balganesh says this is why the phrase 'right to exclude' in the Patent Act appears in the section on the *grant* of patents and not in the section on remedies. Id., at 628. His point is that patent law borrows the moral language of inviolability so as to express the strength of the rights held by a patent owner. In my view, inviolability remains not just a unifying trope, but an actual (if not absolute) fact about IP rights.

[45] Neil MacCormick, Discretion and Rights, 8 Law & Phil. 23, 35 (1989).

[46] Id.,at 32. It should be noted, however, that MacCormick believes that in some definitional sense, (excessive) discretion is opposed to rights; therefore, in his view, the two-level approach described in the text might not be an example of an operative right at all.

[47] Christopher B. Seaman, Permanent Injunctions in Patent Litigation After Ebay: An Empirical Study, 101 Iowa L. Rev. 1949, 2006 (2016).

3.3 Why Intellectual Property Rights Are Not 'Regulation'

3.3.1 The First Sense of 'Regulation'

The leading scholar of IP law, Professor Mark Lemley, raises a different sort of argument against IP as property. Because of his prominence, and because there is something valuable in his critique, I take some time here to traverse his points. While I think he is wrong, he does point to a trend – call it the 'statutorification' of IP law – that raises some legitimate concerns.

Lemley says that IP is a form of regulation, and not a true property right:

> Intellectual property (IP) is a form of market entry and price regulation. The government grants a favored party the legal right to exclude others from entering the market at all (in rare cases in which an IP right is coextensive with an economic market), from entering the market under certain terms and conditions (via injunctions), or from entering the market without paying an entry tax (via a patent damages award). Modern IP is certainly more like regulation than it is like property, at least as people traditionally think of property, though there are certain kinds of property that have regulatory characteristics because they are used to define markets or restrict entry. Even disciples of the 'IP is property' faith generally acknowledge that IP is not much like real property. Rather, as the Supreme Court put it in the nineteenth century, IP is like the government grant of an exclusive franchise. Taxi medallions, exclusive concessions at airports or sporting events, and the old East India Company might all be described as property rights. But they are unlike other property rights in that their character is essentially regulatory: the right conferred by government fiat is the right to control competition.[48]

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[48] Mark A. Lemley, Taking the Regulatory Nature of IP Seriously, 92 Tex. L. Rev. See Also 107, 107-108 (2014) (hereafter Lemley, Regulatory Nature of IP). To be fair, it should be noted that Lemley does issue this disclaimer: 'In prior work, I have suggested that while regulation is the closest analogy to IP, we might be better off doing without analogies altogether, because all of them, including regulation, carry baggage,' Id., citing Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 Texas L. Rev. 1031, 1032 (2005). Others have noted similar features of IP law. *See* Shubha Ghosh, Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred, 19 Berkeley Tech. L.J. 1315 (2004). For an alternative analysis, based on property concepts, see Irina D. Manta & Robert E. Wagner, Intellectual Property Infringement as

And this concept of IP as regulation is offered in distinct contrast to the view that IP rights are true property.[49] IP as regulation avoids the 'mischief' that can be caused when property rhetoric is applied to IP. The chief problem is that old bugaboo, property absolutism. One example, according to Lemley: 'Indeed, those who analogize intellectual property to real property often assert that intellectual property should be perpetual, just as real property is.'[50] This is incorrect as a factual matter; serious students of IP almost never propose any such thing. But the regulatory view of IP advances mostly via this kind of speculative projection: it attributes a staunch absolutism to property theorists, or at least to the common understanding of property.[51] Put differently, the idea that property implies absolutism (or inevitably leads other actors to so presume) is the rigid worldview regulatory theorists condemn. Property theorists insist that the institution of property does not have an absolutist ideology as its essence. But those who favor IP as regulation disagree; they claim that less sophisticated actors see the property label as an absolutist totem, and will be unable to resist its pull:

> Anyone who sees [property as originally and therefore always about land] will always see intellectual property as an awkward transplant. For them, the idea of property contains certain historical- essentialist traits that cannot be altered to better adapt it to intangible things. As applied to intangibles, property will always have the feel of a northern fir in the tropics, or a damp fern in the high desert. It just does not fit.[52]

Vandalism, 18 Stan. Tech. L. Rev. 331 (2015) (analyzing the relationship between intellectual property and real property law, with a particular emphasis on remedies).

[49] Lemley, Regulatory Nature of IP, at 107 n.1. Lemley does note that there are some who view property as a broad and expansive institution, but he says they distort the concept so severely that they 'cause great mischief'. Mark A. Lemley, Taking the Regulatory Nature of IP Seriously, 92 Tex. L. Rev. See Also 107, 108 n.3 (2014).

[50] Mark A. Lemley, What's Different About Intellectual Property?, 83 Tex. L. Rev. 1097, 1104 n. 23 (2005).

[51] As I argue later in this section, property theorists assiduously avoid this sort of absolutism. For examples of those who believe property is an expansive concept, see Michael A. Carrier, Cabining Intellectual Property Through a Property Paradigm, 54 Duke L.J. 1, 1 (2004) (discussing the many ways in which property law 'is not as absolute as is often claimed'); Carol M. Rose, Canons of Property Talk, or, Blackstone's Anxiety, 108 Yale L.J. 601, 603 (1998) (noting that 'Blackstone himself was thoroughly aware of ... pervasive and serious qualifications on exclusive dominion').

[52] Merges, Justifying IP, at 4.

The same passage rejects the historical-essentialist view that property leads to absolutism:

> The very wide range of things that property concepts have been applied to suggests to me an expansive and highly adaptable legal category. Land, tools, trees, minerals, water, fractional ownership claims, legal obligations to pay money— these and many, many other things are subject to property's wide embrace. Over its long career, property has shown a restless capacity to jump from one arena into another, morphing and adapting as it goes. While some of its distinctive features were shaped by its early history, I believe this history supplied property not with a set of burdensome constraints, but largely with a highly adaptable and flexible conceptual vocabulary that renders it wonderfully adaptive to all sorts of new things and situations. This vocabulary is singularly effective in structuring relations between legal actors and unique things of value to them. Property has proven robust because, like a spoken language that grows and spreads, it has shown itself quite capable of absorbing new dimensions and changing in significant ways, while retaining fidelity to certain core principles that provide its basic structure.[53]

So I disagree that IP is 'fundamentally unlike' real property. Or that the concept of property itself is (or ought to be) a narrow one.[54] I also believe that IP rights are very different from government regulation. In what way?

Though the grant of an IP right under a statute is an event with important social consequences, the deployment, assertion, or licensing of such a right is undoubtedly a private law event. IP disputes are almost always between two private parties.[55] This alone brings them outside the realm of regulation – i.e., the realm of public law.[56] Both civil law and common law scholars classify IP as a private law field.[57] As with contract law –

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[53] Id., at 4-5.

[54] For a like-minded view, see Peter S. Menell, The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?, 34 Ecology L.Q. 713, 722 (2007).

[55] And even an IP infringement suit against a government actor is in many ways more in the way of a private law dispute.

[56] Richard A. Epstein, Unifying Copyright: An Instrumentalist's Response to Shyamkrishna Balganesh, 125 Harv. L. Rev. F. 120, 120 (2012) ('[T]he definition of private law does not depend on the origin of the rights in question, but only on the parties to a particular dispute. Private law involves suits between two private individuals . . . ').

[57] *See, e.g.*, Ralf Michaels, Nils Jansen, Private Law Beyond the State? Europeanization, Globalization, Privatization, 54 Am. J. Comp. L. 843, 847 (2006). *See also* See James

a classic private law field – the state is involved at the enforcement stage, when private parties need to resolve a dispute. But the state here plays a secondary role, merely helping the private parties effectuate the purpose they set out to achieve (in contract) or to protect a private party's zone of autonomy (torts and property). The state serves the goal primarily of delivering corrective justice; it acts in the service of a private right holder.

Regulation usually denotes the need for private parties to obtain more specific and direct government authorization. To regulate means to control, govern, or direct by rule. In private law, the parties control and set the rules (within bounds, of course); the government merely effectuates these private purposes if and when the power of the state is invoked to further the private ends of the parties. In regulation, and public law generally, the government's role is direct. It specifies, through some statute or publicly applicable rule, an appropriate course of action. And it enforces its edicts directly, often without the need for a private party to instigate enforcement. Put simply, regulation typically requires direct government permission or compliance.

So is it right to call property rights, and the transactions based on them, regulation? Well, there are thousands of transactions every day involving real and personal property. The vast majority require no government permission to go forward. (Notification sometimes, yes; permission, no.) There are likewise thousands of IP transactions every day. A consultant writes ad copy or a musical jingle and licenses it to a client; a freelance programmer writes a patch on some old software code for a client; a composer licenses a piece of music for use in a movie; an inventor assigns a patent to a startup company she is forming; a biotech company concludes a carefully worked out licensing arrangement giving distribution and limited manufacturing rights to a big pharmaceutical company; and so on and so on.

In each case complex commercial arrangements are worked out around the centerpiece of a government-granted right to exclude. No permit or government approval is needed. No regulatory authority is consulted. We see in these multitudinous transactions the classic distinction between private and public law. The government is a necessary component of each; it grants the rights or allows for (but does not order) their enforcement. In private law fields, the government grants property rights and enforces contracts. But the action is directed by private actors. The government's enforcement power is invoked when there are disputes between private parties. Government approval (or grant) of initial entitlements, and government resolution of private disputes differ from direct regulatory approval.

Gordley, Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment (2006).

It is true, as regulatory theorists say, that IP is ultimately about 'market entry.' And IP can act as a barrier to entry. But the crucial point is this: once the right is granted, there is typically no government permission needed to conclude the private deal-making that determines terms and conditions of market entry.[58]

The fact that economists have argued for some time that more regulatory approvals ought to be bought and sold on the market does not mean that the line between property and regulation has disappeared. The desire to make (some) regulatory approvals take on more 'property-like attributes' does not mean that property is regulation and vice versa. There are still major differences between allocating private decision rights in respect of discrete assets (property) and requiring government permission to do things that might affect the general public welfare.

Okay, so maybe IP is only 'regulatory' in a loose sense. Maybe the point is more normative: equating IP to regulation is less than completely accurate, but it has the benefit of providing an alternative to IP as property. It avoids the dangers of 'property talk'. Shouldn't we give credit for lowering the risk of negative consequences that may follow from calling IP property?

To begin, the negative consequences of calling IP property are only rarely spelled out. These worriers are generally concerned that the image of fee simple absolute in land will blind people to the subtle requirements and limitations of property rights in other kinds of assets. But this is a baseless fear I think. Do we worry that the fee simple concept carries over to ownership of personal property like a car? Not really. An ambitious would-be pet sitter who puts a business card on a car windshield while the owner is in a store does not worry about the strict law of trespass that follows from the label of property. The would-be pet sitter knows that this type of asset, a car, in this location, a parking lot, comes with implied norms and limitations concerning permitted activity. The same with a backpack that someone is about to leave behind as they exit a subway car. The helpful stranger who picks it up and hands it to its owner does not worry about licenses and permissions. The property rights in respect of the backpack in that situation are recognized to have implied features that make them different from fee simple absolute in land.

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[58] There are exceptions, such as when a patent covers sensitive military technology, and the licensing deal is with an overseas company, particularly one with ties to an overseas government. Classic concepts of regulation may well apply to deals like this: the state will take a direct interest, and government approval may be necessary. But note that this exception shows just how different the run of the mill transaction is. No governmental agency need approve the deal.

The same is true with IP rights. Despite jokes to the contrary, private families continued to sing 'Happy Birthday' with aplomb while it was in copyright. Graduate students, postdocs, and primary investigators in the sciences use lab techniques and reagents with very little regard for patent rights, despite consistent fears that patents will inject themselves into the research process. And journalists use trademarked terms in news stories on a regular basis without real concern that they will be accused of infringement. Some additional activities might be 'chilled' by the fear of property absolutism, though there is not much evidence for this. All we can say for sure is that a large volume of traditional uses of IP-protected assets continues. Whatever 'mischief' follows from this does not seem to have slowed the wheels of commerce or the workings of society to any appreciable degree.

3.3.2 The Second Sense of 'Regulation'

There is a second way in which IP rights might be like regulation. This comes from the sheer burden of seeking permissions from numerous and dispersed right holders. The idea here is that the collective burden of so many permissions creates the same kind of restrictions and impediments as a single omnipresent government regulation. All the scattered right holders, when considered as a unitary force, constitute one gigantic 'Mother, may I?' regime.[59]

This is not a new thought. It runs under a number of rubrics in the IP literature, most prominently the idea of the 'anticommons.' Central theme: Too many discrete rights, held by too many individual owners, constitute a giant drag on economic activity. It is well-trod territory, perhaps best captured in the title of Professor Michael Heller's book, The Gridlock Economy. Another bumper sticker version of the same idea is 'royalty stacking,' with the same connotation of too many individual hands that must be satisfied before some important economic activity can move forward.

The name of the game is transaction costs. Finding right holders; negotiating deals with each one; handling right holders who assert their rights after costs have been sunk (holdups); resolving conflicts (often through litigation) when negotiations occasionally break down; these are the costs that create all the problems. Too many IP rights, too many costs in threading the needle through all of them – again, an old story in the IP world.

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[59] Mark A. Lemley, The Regulatory Turn in Ip, 36 Harv. J.L. & Pub. Pol'y 109, 110 (2013) (stating that it is a 'complex' question whether IP law is a 'Mother, may I?' regime); but see Id., at 115.

This is a compelling story, and it points towards compelling policies. Its only real defect is lack of evidence. The anticommons works in theory, but not really in practice.[60] Transaction costs exist, but economic activity works around them for the most part. For every theory about why transaction costs will sink the IP ship, there is a new model of transactional activity floated by some entrepreneur that solves the problem, in at least a workable way.[61] Transaction costs are the major problem looming on the IP horizon – and according to IP scholars, they always will be. But that horizon seems to keep right on receding. IP researcher Jonathan Barnett, reviewing the classic account of the anticommons in biomedical research, says:

> Extensive survey studies of biomedical researchers in the United States and other countries provide little evidence that increased patenting has had significant incremental adverse effects on biomedical innovation, in the form of either delayed or halted projects. The survey results are consistent across different samples and countries. A review of these surveys by leading researchers in the

[60] *See* Jonathan M. Barnett, *The Anti-Commons Revisited*, 29 Harv. J. L. & Tech. 127, 130 (2015).

[61] Compare Michael A. Heller & Rebecca S. Eisenberg, Can Patents Deter Innovation? The Anticommons in Biomedical Research, 280 Science 698 (1998) with Jonathan M. Barnett, The Anti-Commons Revisited, 29 Harv. J. L. & Tech. 127, 145 (2015) (hereafter Barnett, Anticommons) citing Wesley M. Cohen & John P. Walsh, Real Impediments to Academic Biomedical Research, in 8 Innovation Policy and the Economy 1 (Adam B. Jaffe, Josh Lerner & Scott Stem eds., 2008) (reviewing multiple surveys of industry and academic scientists and finding that patent-related access limitations or other 'anticommons' effects rarely impede research) and citing Zhen Lei et al., Patents Versus Patenting: Implications of Intellectual Property Protection for Biological Research, 27 Nature Biotech. 36 (2009) (reporting survey findings showing that scientists 'do not [generally] encounter an anti-commons or a patent thicket' but that mandated technology transfer agreements can slow down the exchange of research tools, and reporting perception that those agreements are associated with an academic environment in which patenting is encouraged) and John P. Walsh, Charlene Cho Wesley M. Cohen, View from the Bench: Patents and Material Transfers, 309 Science 2002 (2005) (finding that only one percent out of 414 interviewed academic biomedical researchers reported any delay in research, and none reported halting research, due to access constraints attributable to patents); John P. Walsh, Ashish Arora & Wesley M. Cohen, Working Through the Patent Problem, 299 Science 1021 (2003) (finding that scientific research communities have developed work-around solutions to patent-related transactional obstacles or, in some cases, follow norms that tolerate limited infringement, based on interviews with seventy IP attorneys, scientists, and managers from pharmaceutical firms, biotech firms, and universities).

> field concludes: '[L]egal excludability due to patents does not appear in practice to impose an important impediment to academic research in biomedicine. . . .'[62]

But what about other fields? And what about actual innovations – not research, but the delivery of actual new products on the market? Could it be that patents are having a negative effect in these other ways?

Of course it could be. But the facts do not seem to indicate this level of concern. In the software industry, where patents have long been thought to be troublesome at least and ruinous at worst, innovation seems quite robust.[63] More generally, in the Information and Communications Technology (ICT) industries where patent 'thickets' and extensive litigation have caused the greatest alarm, Barnett concludes there is little or nothing to worry about:

> Throughout a period in which patent applications and issuance have grown at historically significant rates, various measures indicate that innovation in the ICT sector has continued at robust levels and prices have steadily fallen. On the supply side, private R&D spending in the U.S. computing and electronics industries has grown almost every year for the period 1998-2013. On the demand side, consumers of electronics goods have enjoyed an uninterrupted flow of new products, increasing output and declining prices during that same period. Consider the computer industry: prices for computers and peripheral equipment have declined every year from 1995 through the present, while worldwide shipments of servers, desktops and laptops have increased from 1.1 million units in 1980 to an estimated 517 million units as of 2015. Data collected by other researchers with respect to telephone equipment, televisions, personal computers, and portable computing devices - all patent-intensive industries - shows relative price declines (adjusted for quality) over the period 1992-2013 and especially dramatic declines since 2005. If we look more closely at particular segments of the information technology industry, the same pattern indicative of a healthy competitive market-declining prices and increasing output repeats: (1) worldwide shipments of smartphones increased from one-half billion units in 2011 to over one billion units in 2013; (2) worldwide shipments of tablet computers increased from zero in 2010 to slightly more than 200 million in 2013; and (3) worldwide shipments of Bluetooth-enabled devices increased from zero in 2000 to approximately 2.5

[62] Barnett, Anticommons, at 145, quoting Wesley M. Cohen & John P. Walsh, Real Impediments to Academic Biomedical Research, in 8 Innovation Policy and the Economy 1, 11 (Adam B. Jaffe, Josh Lerner & Scott Stem eds., 2008).

[63] See Robert P. Merges, Software and Patent Scope: A Report from the Middle Innings, 85 Tex. L. Rev. 1627, 1628 (2007).

> billion units as of year-end 2013. If there is an [anticommons] effect in the electronics and communications markets, it has yet to be realized.[64]

To summarize: traversing property claims in pursuit of private economic activity is not the same as negotiating government regulation. And in addition, to the extent that there is a concern about excessive private clearances or permissions, the evidence does not support the concern that thickets or tangles of IP rights are slowing down research, innovation, or economic activity generally.

3.3.3 Freedom and Permission

The second sense in which Lemley and others use the term 'regulation,' then, is really about the need to clear IP rights. Lemley argues that the need to get permission before market entry can be expected to slow the rate of innovation, and is in general counter to economic freedom. I have just shown that, as a positive matter, the concern with 'excessive' private permissions is probably unfounded. Now let me pursue an alternative issue, taking the idea of excessive permission as a possible future concern: whether IP is or is not slowing innovation in our current system, IP has the capacity to do so by encumbering market entrants. It is therefore potentially akin to state regulation in terms of its effect on the freedoms available to economic actors. It holds the capacity to impinge on private individuals and firms, requiring them to jump through legally backed hoops before they can do what they want to do. Its primary function, from the point of view of a would-be entrant, is to restrict. This explains Lemley's position that IP ought to be anathema to libertarians. Like state-issued laws and regulations, privately owned IP has the capacity to get in the way of things that people want to do.

This argument for IP as regulation fails in its basic purpose.[65] The rhetorical strategy is to appeal to libertarian impulses. But the argument, which equates permission from private right holders with excessive state regulation, misunderstands basic libertarian principles. In libertarian thought, permission from private right owners differs fundamentally from

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[64] Barnett, Anticommons, at 143-144.

[65] Self-identified libertarians and 'classical liberals' themselves have no doubt about the property status of patents. Frank H. Easterbrook, Intellectual Property is Still Property, 13 Harv. J.L. & Pub. Pol'y 108, 112 (1990); Simone A. Rose, Patent 'Monopolyphobia': A Means of Extinguishing the Fountainhead?, 49 Case W. Res. L. Rev. 509, 515 (1999) (recommending that the Patent Act be amended to clarify that 'patents are property'); Richard A. Epstein, The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary, 62 Stan. L. Rev. 455 (2010); Adam Mossoff, The Trespass Fallacy in Patent Law, 65 Fla. L. Rev. 1687, 1692 (2013) ('Patents have long been identified as property rights in American law.')

compliance with state regulation. This is quite clear from basic writings from this school of thought. It is also clear with particular respect to IP rights. U.S. cases from the nineteenth century, which was as close to a libertarian era as we have had in U.S. history, recognize without criticism the fact that IP ownership entails the need for third parties to gain permission in many cases. The requirement to license patents, in other words, was never equated with state regulation during this period. Clearing multiple contracts with individual owners was never compared with regulatory compliance. To assimilate the two types of permission in a single category ('Mother, may I?') is to commit a serious category mistake.

Classic libertarian thought defends private entitlements – even when these might entail 'permission.' Permission, in fact, is just another way of saying 'private ordering.' Structuring economic activity on the basis of entitlements will normally involve rights that demand permission. This is the basis of private ordering; the right holder bargains away his or her permission, in exchange for something of value. The only requirements a libertarian imposes on the legitimacy of entitlements is (a) that they be obtained without force or fraud, and (b) that whoever holds them has a clear chain or title stretching back to the original (legitimate) acquisition.[66] Entitlements held by virtue of rent-seeking are not legitimate in this setup, but so long as IP rights are assigned neutrally on the basis of merit as defined by the relevant statutes, there can be no complaint about the original acquisition of these rights.

The simple point is that for libertarians, contractual restrictions – and the need for permission that follows from them – are not at all on the same plane as state regulation. The great defender of Benthamite individualism in nineteenth century Britain, A.V. Dicey, said this:

> Laissez faire, be it noted, was with Bentham and his disciples a totally different thing from easy acquiescence in the existing conditions of life. It was a war-cry. It sounded the attack upon every restriction, not justifiable by some definite and assignable reason of utility, upon the freedom of human existence and the development of individual character. Bentham assaulted restraints imposed by definite laws.[67]

But did this same concern extend to contractual restrictions? Hardly:

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[66] Robert Nozick, Anarchy, State and Utopia 161-163, 182-184 (1974).

[67] Albert Venn Dicey's Law and Public Opinion in England in the Nineteenth Century (2d ed. 1919), at 104.

> From these three guiding principles of legislative utilitarianism—the scientific character of sound legislation, the principle of utility, faith in laissez faire — English individualists have in practice deduced the two corollaries, that the law ought to extend the sphere and enforce the obligation of contract, and that, as regards the possession of political power, every man ought to count for one and no man ought to count for more than one.[68]

But what about the fact that contracts restrict freedom of action? What about the concern that contracts create a 'Mother, may I?' regime? Not an issue:

> Once [we] admit that A, B, or C can each, as a rule, judge more correctly than can any one else of his own interest, and the conclusion naturally follows that, in the absence of force or fraud, A and B ought to be allowed to bind themselves to one another by any agreement which they each choose to make—i.e., which in the view of each of them promotes his own interest, or, in other words, is conducive to his own happiness.
>
> From one point of view, indeed, a contract between A and B whereby, for example, A agrees to sell and B to buy a horse for £20, places a limit upon the freedom of each of them, since A comes under a legal compulsion to sell, and B comes under a legal compulsion to pay for the horse; but, if the matter be fairly considered, it is easily seen that freedom of contract is an extension of an individual's power to do what he likes, i.e., of his freedom. As both A and B are at full liberty not to enter into a contract at all, it must be assumed that, at the moment of contracting, A wishes to have £20 instead of the horse, and B wishes to have the horse at the price of £20. For the law to give effect to the agreement by which this result is attained, as also to more complicated contractual engagements, is nothing else than an extension of each individual's power to get what he wants.[69]

As with the purchase and sale of a horse, so with complex patent licensing transactions. Of course, the need for a multitude of patent licenses creates a complex transactional landscape for others. Still, the basic principle holds. Each property owner (patentee) has the right to structure economic activity according to his or her wishes. The 'restrictions' this creates for third parties are, from a libertarian point of view, not a defect. They are simply a side effect of the private ordering that each patent owner has the right to. The number or complexity of transactions in no way undermines what Dicey called the 'zeal .

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[68] Id.

[69] Id., at 104-105 (footnote omitted).

. . for freedom of contract.'[70] Nineteenth century U.S. jurisprudence embodied the same stance: private contractual permission was considered a necessary adjunct to the proper exercise of private property and contract rights, while regulation demanding government approval was an altogether less favored proposition.[71]

3.3.4 Permissions in Historical Perspective

The general point is that private contracting is not the same as governmental pre-approval. Courts in IP cases recognized this general principle from early in the nineteenth century. The cases speak plainly in saying that patent and copyright licenses are not equivalent to government regulation.

To begin with, IP was recognized and respected as a legitimate state-granted form of property from the earlier, more libertarian, days of US history. The status of IP rights as property was simply never questioned in this earlier era.[72] In patent cases, for example, judges instructed juries that a 'patent right . . . is a right given to a [person] by law where he has a valid patent, and, as a legal right, is just as sacred as any right of property.'[73]

This conception of patents as rights, and thus a form of property, was in no way weakened by recognition that at times economic actors would have to seek permission to make, use, and sell technologies. Permission of this type was simply not understood as an illicit check on economic freedom. In fact, permission from patentees was understood to

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[70] Id., at 105.

[71] *See, e.g.*, Farrington v. State of Tennessee, 95 U.S. 679, 682 (1877).
See also The Slaughter-House Cases, 83 U.S. 36, 90 (1872) (the Fourteenth Amendment 'was undoubtedly' designed 'to give to [each citizen] the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor.'); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) ('The fourteenth amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that . . . all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for . . . the enforcement of contracts'); Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897, 61 J. Am. Hist. 970, 973 ('The Fourteenth Amendment, [Justice Field] periodically asserted, was 'undoubtedly intended' to protect both the title to a person's property and his liberty to dictate its use and 'enjoy' its income').

[72] *See* Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tulane L. Rev. 991 (1990).

[73] Hayden v. Suffolk Mfg. Co., 11 F. Cas. 900, 901 (C.C.D. Mass. 1862) (No. 6,261).

be an essential attribute of granting patents in the first place. Thus in an 1850 case involving the famous telegraph invention of Samuel F.B. Morse, the Court said:

> The same latitude for further inventions and improvements is open to others as was open to Mr. Morse himself. He was allowed to make any improvement on his predecessors; and others are equally allowed to make any improvement on him. To be sure, if his improvement was engrafted on a machine or manufacture before made and patented, he could use or patent only his improvement, and not what had been previously patented, without obtaining first a license or purchase from the patentee. So of others in relation to him.[74]

The need for permission – the 'Mother, may I?' requirement – did not affect the Court's view that Morse's invention was 'his own property.'[75] Another case from this era noted the many restrictions and permissions that follow from property in general. In one passage, the Court distinguishes the permissions required under federal patent law from those that are incidental to run of the mill personal property, which is governed by state law:

> The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. . . . But the purchaser of [an] implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. . . . The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. . . . And if [the owner's] right to the implement or machine is infringed, he must seek redress in the courts of the State, according to the laws of the State, and not in the courts of the United States, nor under the law of Congress granting the patent. The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the State in which it is situated. Contracts in relation to it are regulated by the laws of the State, and are subject to State jurisdiction.[76]

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[74] Smith v. Downing, 22 F. Cas. 511, 519 (C.C.D. Mass. 1850).

[75] Smith v. Downing, 22 F. Cas. 511, 519 (C.C.D. Mass. 1850) ('[T]he patentee . . . is allowed to protect that improvement, as he ought to be—it being his own invention, his own property, and the fruit of his own exertion, though, of course, it does not protect, and should not, a monopoly of what else may have been invented by others before, or may be invented by them afterward, on the same subject').

[76] Bloomer v. McQuewan, 55 U.S. 539, 549-550 (1852). One might incorrectly assume that the use of the term 'franchise' in this passage ('the franchise which the patent grants') has a regulatory sound to it; and that it sets up a tension with the later part of the passage, referring to patents as 'his private, individual property'. The truth is that

Our interest here is not the relationship between state and federal law that arises when patented items are sold outright to buyers. It is the fact that the Court recognizes the many permissions required in a system of property entitlements. And this in an era that has been described as the 'golden age' of liberty – the high water mark of libertarian thought.

3.4 Intellectual Property Rights as Property Rights: Summing Up

IP rights are ownership claims in respect of individual assets that are good against the world. They allow owners to invoke the power of the state (when they choose to do so) to exclude others, or in some cases to extract damages for failing to 'keep out.' As with all property, they are not absolute. In the case of IP, the rights must be pursued, maintained, or at least enforced through the offices of government agencies. They are limited in time and in other ways as well. They are not permits to serve a market; they can be subdivided and assigned; and they are invoked at the discretion of individual owners. In other words they are property, plain and simple.

I have argued to this point that IP rights are property rights. Much of the emphasis has been on the proper status of IP as property, and why that is not a negative label that inevitably leads to absolutist positions. What about the second half of the phrase: IP as rights? Is there a downside to this part of the formulation?

Legal language is filled with references to rights. The 'right to vote,' the 'right to marry,' the 'right to assemble', and so on. There are many senses of the word, and indeed in general usage it is often tantamount to the notion of a claim.[77] Especially in constitutional law, there are so many rights that they often come in conflict, and the structure of the case law is often built around resolving clashes between conflicting rights.

Professor Mary Ann Glendon famously said that there was in fact too much 'rights talk.' She decried the absolutism of the language of rights, and said that this way of speaking

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nineteenth century courts routinely defined a patent 'privilege' or 'franchise' as the grant of a property right. Adam Mossoff, Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent 'Privilege' in Historical Context, 92 Cornell L. Rev. 953, 992-993 (2007); see also id., at 1002-1003 (equating 'franchises' with 'privileges': 'the patent statutes secured special legal privileges granting monopoly franchises to inventors').

[77] Oxford English Dictionary (2d ed. 1989), 'Right,' meaning 9: 'A legal, equitable, or moral title or claim to the possession of property or authority, the enjoyment of privileges or immunities, etc.'.

implicitly supports the abbreviation and rigidity that characterizes so much political discourse:

> Though sound-bites do not permit much airing of issues, they seem tailor-made for our strident language of rights. Rights talk itself is relatively impervious to the other more complex languages we still speak in less public contexts, but it seeps into them, carrying the rights mentality into spheres of American society where a sense of personal responsibility and of civic obligation traditionally have been nourished. An intemperate rhetoric of personal liberty in this way corrodes the social foundations on which individual freedom and security ultimately rest. . . . [T]ime and again it proves inadequate, or leads to a standoff of one right against another. . . . [because of] its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.[78]

One telling example, quite relevant for our purposes here, concerns property claims:

A penchant for absolute formulations ('I have the right to do whatever I want with my property') promotes unrealistic expectations and ignores both social costs and the rights of others. A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civic obligations.[79]

In the end, Glendon's critique has much in common with the critique of IP as property. The main complaint again is the tendency to absolutism: the belief that labeling a thing as a 'right' influences debate in the direction of strengthening legal claims over that thing at the expense of competing claims.

For all the reasons I described earlier with respect to the debate over property, I reject the charge of absolutism. I reject it on conceptual grounds, in that it would surrender a valuable and flexible legal term before joining the fight over the ways it ought to be limited. And I reject it on consequentialist grounds. There is basically very little evidence that 'IP rights talk' has held back the development of exceptions and limitations in IP law. The feared-of consequence – absolutism – has not in fact come to pass.

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[78] Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1993), Preface, at p. x. Then at p. xi:

[79] Id., at xi.

During the contemporary era, when IP rights have become a common phrase, we have witnessed some strengthening of IP rights, it is true. But it is also undeniable that we have seen vigorous and effective pushback against this trend. Fair use in copyright law has been expanded and vigorously protected. As we have seen, remedies in patent law have been adjusted, and the 'automatic injunction' rule swept away by eBay. New institutions for cheaper ways of invalidating patents have been enacted and embraced. Nominal use and other limitations in trademark law have been expanded. I have argued at length elsewhere that it is nigh impossible, using current techniques and data, to figure out whether IP law as a whole is net social welfare positive or not. But I do not think it defensible to say that since the era when legal actors began talking about IP rights the law has marched inexorably in an absolutist direction. The data are good enough to refute that charge. And with it, the concerns over 'rights talk' as well as over 'property talk' have been dispelled. There may be reasons to refrain from calling IP 'property'. But concern that this language will push us inexorably into the chasm of absolutism is not a legitimate reason. The evidence is not there.

4. Problems With Conceiving Intellectual Property as Property

Though property is a broad concept, this form of entitlement does come with some problems. While I do not believe 'IP as property' points inexorably toward stronger rights or absolutist thinking, it does present some problems. Three of them concern me here: Group ownership claims; takings; and transaction costs.

4.1 Group Ownership

The great thing about property is that it provides a focal point for bargaining over an asset or resource. But one problem is that sometimes, many hands go into the creation or development of a valuable asset. When those many hands can be effectively represented by a single entity – such as in a corporation or partnership – there is no focal point problem. (Issues of fairness regarding the respective contributions of individuals are another matter.) But what happens if there are no clear rules about group ownership? An example is the members of a traditional tribe, village, region, or ethnic group; IP law has struggled at times with the problem of awarding rights in respect of group creations such as handicraft styles, traditional medicines, and folklore.

Another type of group-created asset arises when dispersed individuals form around some central resource such as a technological platform, canonical content repository, or the like. Examples here include user-generated computer programs and know-how surrounding online computer games, programming languages, and software

applications.[80] When individual contributions are identifiable and substantial, individual IP rights may still make sense. But when individual contributions are very small, and/or difficult to associate with individual contributors, the value lies in the aggregate collection of user-supplied material. The logic of individual property claims makes little sense for such decentralized, dispersed contributions. Yet the aggregate value of the individual contributions may be very great. Consider for example macros and 'scripts' for use with a popular and widely-available software platform, such as the Adobe PDF format or Microsoft Excel or Adobe Photoshop.[81]

A software copyright case from the 1990s, Lotus v. Borland,[82] actually confronted this issue.[83] In the case, the First Circuit denied copyright protection to the menu command structure of the Lotus 1-2-3 spreadsheet program. The majority's holding was straightforward, and came right out of the copyright statute.[84] But the concurrence by Judge Boudin was different. In it he stressed that much of the value of Lotus's menus was created by the efforts of those who used the 1-2-3 program:

> Requests for the protection of computer menus present [a] concern with fencing off access to the commons in an acute form. A new menu may be a creative work, but over time its importance may come to reside more in the investment that has been made by users in learning the menu and in building their own mini-programs—macros—in reliance upon the menu.
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> . . . .
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> A different approach [to resolving this case] would be to say that Borland's use is privileged because, in the context already described, it is not seeking to appropriate the advances made by Lotus' menu; rather, having provided an arguably more attractive menu of its own, Borland is merely trying to give former

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[80] Fanfiction – stories, artwork, and other adaptations of well-loved fictional worlds such as Star Wars, Star Trek, the Twilight, etc. – is a bit different. User-generated stories, modifications, and adaptations of well-loved fictional worlds can be seen, collectively, as group-created material; but it may often be easier to identify individual contributions within each genre of fanfiction.

[81] *See, e.g.*, Pauline Cabrera, '11 Best Sites To Find Free Photoshop Actions,' July 2, 2013, avail. at http://www.twelveskip.com/resources/ps-actions/594/11-best-sites-to-find-free-photoshop-actions-in-2013 (listing good websites for downloading 'actions', or macro scripts, for working with Adobe Photoshop, a popular photo editing program).

[82] *Lotus Dev. v. Borland Int'l,* 49 F.3d 807 (1st Cir. 1995).

[83] The analysis here is drawn from Robert P. Merges, *Locke for the Masses*, 36 Hofstra L. Rev. 1179 (2008).

[84] *Id.* at 819-20 (finding that 'expression that is part of a 'method of operation' cannot be copyrighted').

> Lotus users an option to exploit their own prior investment in learning or in macros. The difference is that such a privileged use approach would not automatically protect Borland if it had simply copied the Lotus menu (using different codes), contributed nothing of its own, and resold Lotus under the Borland label.[85]

The idea that the users' collective efforts, their labor, should count in the analysis of the original program owner's property rights builds implicitly on the idea that property has to do with labor; that central to a legitimate property claim is the expenditure of labor. This is pure John Locke, of course.[86] But the Boudin concurrence defied conventional thinking in contemplating the assignment of some sort of property right to the dispersed users; or, at any rate, recognizing the efforts of the dispersed users in the overall property calculus relating to the Lotus 1-2-3 program.

This intriguing idea runs up against two practical problems: (1) the scope of the right, and (2) group representation. Sometimes for example a group has a norm against commercializing group-created content; if so, the group-level rights to the material will take the form of a strictly negative right: the right to prevent commercialization. This strategy, of using property to prevent privatization, is now well-known due to the Creative Commons and open source content projects. There may however be need for other rights. At times the group might simply want recognition for group-level contributions or adaptations, for example. And it is even conceivable that the group might want to profit from some of its work, which would entail (a) licensing the right to use group content, and (b) enforcing group-level rights against infringers.

To some extent the group itself may determine the scope of rights it will retain in group-level content.

The key to solving this problem is to figure out focal point constructs.[87] Ideally this takes the form of some representative person or small decision-making body endowed with the right to speak for the group. Though the IP rights will belong to and reside with the wider group, the group can delegate the focal point function to a person or body chosen to represent the group. Obviously governance of this type comes with the potential for problems, in particular self-dealing or conflicts of interest between group representative and the group as a whole. And the solution must be drawn from the toolkit of oversight, supervisory, and regulatory instruments developed in the law of corporations, trusts,

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[85] *Id.* at 819, 821 (Boudin, J., concurring)..

[86] *See* Merges, Justifying Intellectual Property, Chapter 2, 'Locke,' pp. 31-67.

[87] For one, characteristically creative, approach, see Abraham Bell & Gideon Parchomovsky, Copyright Trust, 100 Cornell L. Rev. 1015 (2015).

government administration, and the like. This will entail costs. Overseeing the fairness of group representatives means there must be procedures to investigate and punish irregularities. Even when perfect and fair, these procedures can be costly. But if they are capable of being misused by disgruntled group members, costs may rise further. This is all unfortunate, but it is necessary. If a group creates something valuable and worth protecting, then focal points for securing legal rights and making deals are essential. If there are costs in overseeing these focal point constructs, that's just the inevitable result of extending the benefits of property rights to group-created assets.

4.2 Intellectual Property As Constitutional Property: The Takings Problem

If IP is indeed a right, and in particular a property right, the U.S. Constitution comes into play. When the government executes a 'taking' of property, it must compensate the owner.[88] A full and complete taking, such as a government 'condemnation' of a patented flu vaccine or HIV therapy, would no doubt require payment to the patent's owner.[89] The

[88] U.S. Const. amend. V ('[N]or shall private property be taken for public use, without just compensation').

[89] Horne v. Dep't of Agriculture, 135 S. Ct. 2419, 2427 (2015) (noting that the Takings Clause applies to a 'patented invention' as much as it applies to 'land' (quoting James v. Campbell, 104 U.S. 356, 358 (1882))). Note that my example applies to an outright seizure or condemnation of a patent. Normal, run-of-the-mill patent infringement (such as when a branch of the military manufactures a vaccine that is covered by a privately owned patent) is different. Under established case law, the infringement action is considered a species of tort, and therefore implicates sovereign immunity issues. *See* Zoltek Corp. v. United States, 442 F.3d 1345, 1349 n.2 (Fed. Cir. 2012) (recognizing that 'the patentee's recourse for infringement by the government is limited by the scope of the waiver of sovereign immunity established by the Congressional consent to be sued'). A long-established statutory procedure permits suits against the government for patent infringement. *See* 28 U.S.C. § 1498, which permits a patentee to bring an action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture whenever the government infringes a valid patent). Some commentators believe that cases such as *Zoltek* imply that patents are not subject to Fifth Amendment takings claims. *See* Davida H. Isaacs, Not All Property Is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So, 15 Geo. Mason L. Rev. 1 (2007). But the Supreme Court, and most scholars, hold that they are. *See* Horne v. Dept. of Agriculture, *supra*; Gregory Dolin & Irina D. Manta, Taking Patents, 73 Wash. & Lee L. Rev. 719, 775-780 (2016); Adam Mossoff, Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause, 87 B.U. L. Rev. 689 (2007).

same would be true of the government declared ownership of copyright in a privately authored text or film; the copyright owner would also have a constitutional taking claim.[90] For patents, there is even a statute that covers government infringement of patents.[91] But the stickier problem arises when Congress or the courts change some aspect of IP doctrine. Are there changes to IP law that are so radical they work an effective 'taking' of IP rights? In the technical terms of takings jurisprudence, when should a court find a 'regulatory taking' with respect to IP?

The first part of any answer to these questions is to dispel a myth: that calling IP rights property somehow implies that courts should readily and frequently find changes in IP law and doctrine to be regulatory takings. Wrong. As I have stressed throughout this Chapter, property is a flexible concept. This allows us to say without question that IP is property. The regulations affecting different types of property will themselves differ in nature, number, scope, and intensity. This in turn allows us to say with no hesitation that the property label does not dictate outcomes under regulatory takings doctrine. Those outcomes turn instead on whether by means of a new regulation 'the government has deprived a [property owner] of all economically beneficial uses,'[92] as compared to the baseline situation before the new regulation was enacted. When a new IP-related change is analyzed carefully, it will very rarely meet this test – despite the status of IP as property.

This is so for several reasons. First of all, IP doctrines change over time and always have. So the standard of 'substantial similarity' in copyright has evolved and adapted to

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[90] Roth v. Pritikin, 710 F.2d 934, 939 (2d Cir. 1983) ('An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution'). *See also* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (State statute, Fourteenth Amendment takings claim, sovereign immunity issues: 'The Lanham Act may well contain provisions that protect constitutionally cognizable property interests--notably, its provisions dealing with infringement of trademarks, which are the 'property' of the owner because he can exclude others from using them.'); id. at 675 (noting that the 'assets of a business (including its good will) unquestionably are property' within the scope of the Fourteenth Amendment's Due Process Clause); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999) (Fourteenth Amendment claim under state statute: determining that a patent is property protected by the Fourteenth Amendment's Due Process Clause).

[91] 28 U.S.C. § 1498.

[92] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (finding that land use regulation was a taking because it deprived the landowner of '*all* economically beneficial use' (emphasis in original)).

changing technologies and situations. So too with fair use. Standards of patentability shift over time too; nonobviousness under 35 U.S.C. § 103 may be applied more liberally or more strictly at various times. In trademark, the 'likelihood of confusion' and nominal (or non-trademark) use doctrines have undergone various twists and turns. So the simple point is that, barring a very radical change (such as a nonobviousness standard that makes almost all inventions unpatentable, for example), the baseline expectation in IP law is one of doctrinal evolution and variation. A sudden shift in doctrine would have to all but obviate an entire field of IP law or an entire class of protected things for it to be rightly called a regulatory taking. As the Supreme Court recognized long ago, in the context of land ownership, 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[93]

Second, IP rights are acquired for a number of different reasons and are frequently held in large portfolios. This makes it very difficult to argue that a particular doctrinal shift has eliminated 'all economically beneficial uses' of an IP right. Two IP scholars have argued, for example, that the new administrative patent validity proceedings created by the America Invents Act of 2011 have so increased the risk of patent invalidity that they may constitute a taking of property under the Fifth Amendment.[94] Although the authors make some cogent points, it seems to me their argument ultimately fails. This is because many patents are neither licensed nor asserted in litigation. In fact, many companies hold patents that do not cover any of the products they actually sell. These patents might have been obtained with the thought that a technology would follow a certain path, and it ended up developing in a different direction. Or the patents may cover features of a competitor's product, and are held in reserve, to be used only as bargaining chips if the competitor sues the patent holder, or enters a market especially important to the competitor. In these cases, the extra invalidity risk posed by the new AIA procedures does not affect the economic value very much – not enough for it to be said that the patents post-AIA have been deprived of 'all economically beneficial uses.'[95]

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[93] Quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922),

[94] Gregory Dolin & Irina D. Manta, Taking Patents, 73 Wash. & Lee L. Rev. 719 (2016).

[95] Even for patents that are challenged in an AIA proceeding and invalidated, it would be very difficult to say that the invalidity risk added by the AIA was so substantial that it amounted to a taking of these patents. First, AIA proceedings very often challenge fewer than all the claims in a patent; if even one claim survives, the patent still has some value. Second, because patents have always been subject to administrative challenge (in certain less robust but still widely used pre-AIA proceedings), as well as invalidity challenge in district courts (as a defense to patent infringement lawsuits), it is very difficult to say in a particular case whether the AIA procedures radically shifted the baseline risk. There is always some risk of invalidity; patent defenses are very numerous and quite strict (e.g.,

5. Conclusion

The title poses a question: what kind of rights are IP rights? The answer has two parts:

1. They are property rights.
2. But they are limited property rights.

To summarize: they are property rights because they give individual entities control over discrete assets. They map rights onto the owners of individual assets. They give individual owners a small dollop of state power, in the form of the right to invoke the power of the state to prevent others from impinging on an owner's exclusive domain.

Because of the debate over IP, it has been necessary for me to talk at length about what IP rights are not. The primary point here has been this: they are not absolute, and calling them 'property' and 'rights' does not indicate otherwise. They are shot through with limitations and exceptions – none of which deprive them of the label 'property.' They also, in the main, require affirmative steps to secure but again this does not make them any less property, nor any less a right. In describing what type of rights IP rights are, I employed the terminology and concepts that originated with Wesley Newcomb Hohfeld.

I worked through a number of objections to my thesis, including that the unavailability of automatic injunctions renders them something less than true property. I considered also another prominent critique, which holds that IP is more akin to government regulation. Not so, as I showed at length; regulatory approval is not required for most IP-related deployments and transactions. IP is a field of private law, and not primarily a study in direct government regulation. I tried also to show that 'rights talk' about IP does not inexorably point to absolutist views.

Next I considered some problems that arise from calling IP property. One is the issue of group ownership, which is a problem I expect to become more prominent as technology makes possible widespread and far-flung groups of contributors that are not united in a legally recognized organization or firm. The answer here is to preserve the benefits of property by inventing techniques for identifying focal point representatives of groups, to protect group rights and provide a way for third parties to bargain with the group. The second issue is takings. In my view the fact that IP is property does not dictate an

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very obscure, even unknowable, prior art can torpedo a patent). It is just extremely difficult to conclude with certain that a new procedure increased the risk so much that it amounts to a taking.

absolutist position; I am especially wary of extending the 'regulatory takings' concepts to the fast-changing landscape of IP rules and doctrines.

Throughout I emphasize two highly consistent thoughts: IP rights are real rights; but they are limited rights. They dominate some interests but not all, and they are subject to restrictions and limitations that third parties sometimes hold as rights also. To classify them as property rights is not to cut off debate over a host of issues. It is instead to clarify starting points for a host of future debates. In the immortal words of Maurice Sendak: Let the wild rumpus start![96]

[96] Maurice Sendak, Where the Wild Things Are (1963).