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Patents Are Property: A Fundamental But Important Concept

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

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1. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (1972) (“[T]he legal protection of property rights has an important economic function: to create incentives to use resources efficiently.”). See generally D.T. ARMENTANO, *THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES* (1972) (implying that the U.S. economy primarily utilizes private property).

2. See Richard A. Epstein, *The Property Rights Movement and Intellectual Property*, *REGULATION*, Winter 2007, at 58 (stating that the U.S. has a strong tradition of private property rights).

3. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 509 (Cal. 1990) (en banc) (Mosk, J., dissenting), cert. denied, 499 U.S. 936 (1991).

4. *Id.*

5. *Id.*

6. See ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 414–15 (2d ed. 1993) (explaining that property owners have the right to exclude others and that trespassers can be held liable even if no damage caused).

7. See *id.* at 415.

8. See, e.g., W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 164–65 (5th ed. 1984) (requiring proof of damages in order to recover in a negligence cause of action).

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example, damages are a necessary element.⁹ Likewise, a tort action for negligence or product liability requires proof of damages.¹⁰

It is generally recognized that patents are intangible personal property.¹¹ The United States Constitution's clause enabling Congress to enact patent law specifically states that the law shall grant an exclusive right in inventions to inventors.¹² An exclusive right is merely another way of referring to a property right.¹³ The current patent statute expressly states that patents are property.¹⁴ This is affirmed by numerous Supreme Court decisions¹⁵ and lower court decisions¹⁶ holding that patents are property. Consequently, patent owners should be entitled to protect patent property rights from invasion of third parties without regard to whether the patent owner is injured by infringement.¹⁷ This was the longstanding black letter law¹⁸ prior to the recent Supreme Court decision in *eBay Inc. v. MercExchange, L.L.C.*¹⁹

Patent owners, like all property owners, are not unconditionally entitled to property-based remedies for infringement.²⁰ Traditionally, property owners are entitled to remedies that vindicate unrestricted use of property if a countervailing public policy does not exist.²¹ If such a policy does exist, it may need to be balanced against a property owner's rights.²² All property rights are subject to limitations

9. *Ledain v. Ontario*, 746 N.Y.S.2d 760, 763 (N.Y. Sup. Ct. 2002) ("The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage."), *aff'd*, 759 N.Y.S.2d 426 (N.Y. App. Div. 2003).

10. *KEETON ET AL.*, *supra* note 8, at 164–65.

11. *See, e.g.*, *Fleming v. Okla. Tax Comm'n*, 157 F.2d 888, 890 (10th Cir. 1946) (stating that patents are intangible personal property); *Adams Outdoor Adver. v. City of Madison*, 717 N.W.2d 803, 820–21 (Wis. 2006); *Analogic Corp. v. Bd. of Assessors of Peabody*, 700 N.E.2d 548, 552 n.5 (Mass. App. Ct. 1998).

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

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

14. 35 U.S.C. § 261 (2000).

15. *See, e.g.*, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999); *Cammeyer v. Newton*, 94 U.S. 225, 226 (1876); *Seymour v. Osborne*, 78 U.S. 516, 533 (1871).

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

17. *Jeneric/Pentron, Inc. v. Dillon Co.*, 259 F. Supp. 2d 192, 194–95 (D. Conn. 2003).

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

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

20. *Id.*

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

22. *See* *JESSE DUKEMINIER ET AL.*, *PROPERTY* 195 (6th ed. 2006) (explaining the balance of public policy considerations justifying the restriction of property rights).

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necessary for the furtherance of countervailing public policies.²³ Restrictions attached to the sale of real property—such as total restraints on alienation—are usually void as a matter of law.²⁴ The public benefit of free marketability of property typically outweighs the property owner's right to prohibit transferability by a purchaser of his or her property.²⁵ The existence of nuisance law, zoning law, and land use regulations can limit a real property owner's freedom to engage in certain otherwise legal uses of property.²⁶ However, such restrictions are viewed as necessary, in some circumstances, for the benefit of the public.²⁷ Use and resale restrictions may also apply to tangible personal property to further certain public policies.²⁸ Intellectual property rights under both copyright law²⁹ and trademark law are also subject to limitations based on the importance of free speech encapsulated in the First Amendment.³⁰

Determining whether public policy limitations should restrict traditional property-based remedies for patent infringement requires an examination of the justification for protecting patent rights.³¹ Fostering innovation, the classic argument in favor of patents,³² is expressly enshrined in the Constitution³³ and recognized as legitimate by most commentators and economists.³⁴

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

24. *DUKEMINIER ET AL.*, *supra* note 22, at 195 (stating that absolute restraints on the alienation of fee simple estates are void).

25. See *id.*

26. See *CUNNINGHAM ET AL.*, *supra* note 6, at 512 (explaining that government can control private land use through regulation).

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

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

29. See, e.g., 17 U.S.C. § 107 (2006) (explaining that the fair use exception allows for otherwise infringing uses of copyright protected property under certain circumstances).

30. See, e.g., 15 U.S.C. § 1125(c)(3) (2006) (allowing the use of a trademark for comparative advertising, noncommercial use and for news reporting without penalty).

31. *But see eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006) (allowing use of public interest to restrict the property-based remedy of injunctive relief without examining justifications for protecting property rights).

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

33. U.S. CONST. art. I, § 8, cl. 8.

34. See, e.g., Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993–94 (1997). Some commentators and economists who argue that patents stifle competition view the solution as modifying, rather than abolishing, current patent law. See generally JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008).

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Substantial investments of labor and capital for developing innovative products will only occur in a free market economic system if the potential exists for a monetary return.³⁵ This basic concept is codified in the Constitution³⁶ which incentivizes inventors to engage in development of innovations with the economic potential of property rights in those innovations.³⁷ The resulting fruits of this inventive conduct benefit society in general which is the ultimate goal of patent law.³⁸

The second justification for patent law is the increase in the public storehouse of knowledge that results from the public disclosure of patented innovations.³⁹ This is insured by strict public disclosure requirements included in the patent law.⁴⁰ These requirements mandate that a patent application and any subsequently issued patent must fully enable a person knowledgeable in the relevant area of technology to make and use the invention based on the disclosed information.⁴¹ Patent applications are generally made available to the public eighteen months after being filed with the U.S. Patent and Trademark Office.⁴² If the patent is rejected, the information contained in the application remains in the public domain. If the patent is granted, the patent and the entire written record of the adversary process involved in obtaining the patent is released to the public.⁴³

Patents, despite being property, should be denied property-based remedies for infringement only if legitimate countervailing public policy interests outweigh granting traditional property remedies.⁴⁴ This requires a critical examination of the asserted reasons for limiting or restricting the economic value of patents.

Opponents of patent law often argue that patents create monopolies, thus preventing some members of society from being able to acquire certain patented products.⁴⁵ However, the vast majority of patents, despite high acquisition costs,

35. Lemley, *supra* note 34, at 994.

36. U.S. CONST. art. I, § 8, cl. 8.

37. The incentive is the grant of an “exclusive Right” which is essentially a property right. *Id.*

38. The goal is “[t]o promote the Progress of Science and the useful Arts . . .” *Id.*

39. Peter Fox, Comment, *It’s Not Over for the Product of Nature Doctrine Until the Synthetic Super-Heavy Element (“SHE”) Sings*, 79 TEMP. L. REV. 1005, 1010 (2006) (stating that the goal of patent law is the disclosure of invention to the public); see also Bradford L. Smith & Susan O. Mann, *Innovation and Intellectual Property Protection in the Software Industry: An Emerging Role for Patents?*, 71 U. CHI. L. REV. 241, 263 (2004) (concluding that public disclosure of an invention by a patent enlarges the body of technological know-how on which future inventors can build).

40. 35 U.S.C. § 112 (2000).

41. *Id.*

42. *Id.* § 122(b)(1)(A).

43. The U.S. Patent and Trademark Office maintains an official, publicly available, online database of issued patents. See Patent Full-Text and Full-Page Image Database, <http://patft.uspto.gov> (last visited July 30, 2008).

44. See, e.g., *MPT, Inc. v. Marathon Labels, Inc.*, 505 F. Supp. 2d 401, 420 (N.D. Ohio 2007) (“[T]he public interest supports an injunction [for patent infringement]. There is a general public interest in favor of strong patent protection, except in cases where an obvious public interest such as public health and safety exists.”), *rev’d on other grounds*, 258 F. App’x 318 (Fed. Cir. 2007).

45. See Solveig Singleton, *The Patent Prejudice: Intellectual Property as Monopoly*, THE PROGRESS & FREEDOM FOUNDATION (Oct. 2006), available at <http://www.pff.org/issues-pubs/pops/pop13.28intellectualproperty>

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fail to generate substantial revenue.⁴⁶ Often, little market demand exists for the invention.⁴⁷ Additionally, market substitutes frequently exist for patented inventions that prevent the patent owner from being able to exert significant market power.⁴⁸

A minority of patents generate substantial revenue.⁴⁹ The pharmaceutical industry, for example, relies heavily on patents to generate substantial profits.⁵⁰ Although the inability to obtain a patented product is frequently not problematic, this may be untrue if the invention is a life-saving pharmaceutical.⁵¹ This makes the pharmaceutical industry a common target for anti-patent advocates.⁵² The high cost of patented prescription drugs undoubtedly leads to some patients being denied appropriate treatment.⁵³ Reducing the economic value of patents by limiting the availability of property-based remedies for infringement has superficial appeal in terms of acting as a method of reducing the cost of pharmaceuticals, thereby making them more widely available.⁵⁴ However, the more likely result will be less investment in pharmaceutical research which will produce fewer life-saving drugs.⁵⁵ Ad-

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

46. James Bessen & Michael J. Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1, 8 (2005) (stating that 10% of patents account for 80–90% of economic return on patents).

47. Wendy Yang, Note, *Patent Policy and Medical Procedure Patents: The Case for Statutory Exclusion from Patentability*, 1 B.U. J. SCI. & TECH. L. 5, n.70 (1995) (stating that, with one exception, medical procedure patents have been in low demand); *see also* Ann Bartow, *Separating Marketing Innovation from Actual Invention: A Proposal for a New, Improved, Lighter, and Better-Tasting Form of Patent Protection*, 4 J. SMALL & EMERGING BUS. L. 1, 3–5 (2000) (discussing the use of patents as marketing devices rather than as protection of intellectual property).

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

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

50. *Id.*

51. *See, e.g.*, Tracy Collins, Note, *The Pharmaceutical Companies Versus AIDS Victims: A Classic Case of Bad Versus Good? A Look at the Struggle Between International Intellectual Property Rights and Access to Treatment*, 29 SYRACUSE J. INT'L L. & COM. 159, 165 (2001) (discussing various alternative methods that countries employ to increase accessibility to life-saving medications for their citizens).

52. Roger Bate, *An Exit Strategy for Big Pharma*, AMERICAN, Nov. 27, 2007, <http://www.american.com/archive/2007/november-11-07/an-exit-strategy-for-big-pharma>.

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

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

55. F. M. Scherer, *The Political Economy of Patent Policy Reform in the United States* 5–6 (Harvard Univ. John F. Kennedy Sch. of Gov't Working Paper Group, Paper No. RWP07-042, Sept. 2007), available at <http://www.researchoninnovation.org/scherer/patpolic.pdf> (noting that research and development within the pharmaceutical industry would experience a greater negative impact in the absence of traditional patent protection than other industries).

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

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

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

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

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

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

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

61. Ashlee B. Mehl, *The Hatch-Waxman Act and Market Exclusivity for Generic Drug Manufacturers: An Entitlement or an Incentive?*, 81 *CHI.-KENT L. REV.* 649, 650 n.13 (2006) ("[T]he average price of a generic prescription was half that of the same brand-name prescription, saving consumers an estimated eight to ten billion dollars in 1994 alone." (quoting FED. TRADE COMM'N, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY* 9 (2002))).

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

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

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

65. Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 *AM. BUS. L.J.* 689, 721 (2006) ("Patent troll is a derogatory term applied to small, nonproducing inventors and patent-holding companies that file patent infringement claims against info-tech companies in order to reap big payoffs.")

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weakening property-based remedies.⁶⁶ Justice Kennedy's concurring opinion in *eBay* alludes to such entities as an underlying problem that justifies eliminating the entitlement to a property-based remedy for patent infringement.⁶⁷ This view coincides with opinions expressed by some industry spokespersons who view trolls as entities that merely drive up the cost of products without providing any public benefit.⁶⁸ However, the inventors behind the patents asserted by non-practicing entities are often inventors who have been unsuccessful introducing an invention into the marketplace.⁶⁹ An inventor's lack of success often reflects an inability to raise adequate capital and a lack of marketing expertise.⁷⁰ In a successful free market economy, specialization develops because it is efficient.⁷¹ Consequently, an inventor may excel at innovation while other people excel at raising capital and providing marketing.⁷² An inventor's patent helps to level the economic playing field by making it difficult for dominant market enterprises to ignore inventors.⁷³ Absent the ability to assert patent property rights, fewer inventions will be patented and the public storehouse of knowledge will decrease without the public disclosure from those patents.⁷⁴

66. Paul M. Schoenhard, *Who Took My IP?—Defending the Availability of Injunctive Relief for Patent Owners*, 16 TEX. INTELL. PROP. L.J. 187, 188 (2008) (“[A] widespread fear of so-called ‘patent trolls’ has led to proposed limitations on patentees’ intellectual property rights.”).

67. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring) (“When . . . the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.”).

68. See, e.g., Maggie Shiels, *Technology Industry Hits Out at ‘Patent Trolls’*, BBC NEWS, June 2, 2004, <http://news.bbc.co.uk/1/hi/business/3722509.stm> (showing Intel Corp.’s chief patent counsel detailing the threat that patent trolls pose to the industry).

69. See Antonio Regalado, *Tiny Company Wields Patents Against Giants*, WALL ST. J., Mar. 9, 2001, at B1 (describing a company that acquires intellectual property from inventors who were unsuccessful at entering the market, pressures infringing companies into paying royalties or settlements, and shares the profits with the inventors); see also Andrew Beckerman-Rodau, *The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C.*, 10 TUL. J. TECH. & INTELL. PROP. 165, 172 (2007) (“Frequently, the independent inventor or small startup lacks the enormous resources to bring a patent infringement suit. In such cases, they may assign the patent to an entity that funds the infringement suit in return for a percentage of any recovery.”) (footnotes omitted).

70. Beckerman-Rodau, *supra* note 69, at 172 (noting that startup companies often fail to convert a patented invention into a commercial success because they cannot raise adequate capital and lack marketing expertise).

71. See THE MIT DICTIONARY OF MODERN ECONOMICS 113 (David Pearce ed., 4th ed. 1992). Specialization or division of labor, which is an important part of any successful free market economy, is defined as “[t]he process whereby labour is allocated to the activity in which it is most productive – i.e. in which it can make best use of its skills. As a result no one person carries out all the tasks in the production” *Id.*

72. Beckerman-Rodau, *supra* note 69, at 172 (citing the inability to raise capital and to market the patented inventions as common reasons for startup failure).

73. See Sari Gabay, Note, *The Patentability of Electronic Commerce Business Systems in the Aftermath of State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 8 J.L. & POL’Y 179, 222 (1999) (patents enable small startup e-commerce enterprises to raise capital so they can compete with larger established enterprises); Regalado, *supra* note 69 (noting that ownership of patents can level the playing field between large and small businesses).

74. Mark A. Chavez, *Gene Patenting: Do the Ends Justify the Means?*, 7 COMPUTER L. REV. & TECH. J. 255, 261 (2003) (“Patents encourage ingenuity, which results ‘in an increase in the general knowledge base and

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Some industries complain that patents drive up the costs of making and selling products.⁷⁵ Those costs then act as an innovation tax that must ultimately be passed on to consumers.⁷⁶ Even if this argument is true, it must be analyzed in light of several general aspects of the United States legal system. First, the law is frequently used for social engineering.⁷⁷ Business enterprises are not permitted to operate in a totally free marketplace.⁷⁸ For example, laws to protect worker health and safety, and environmental regulations are imposed on business enterprises.⁷⁹ These regulations add costs that ultimately must be factored into the price of goods and passed onto consumers.⁸⁰ In light of this, expenses generated by the patent system are simply another cost of doing business which is justified by the general societal advantage of encouraging innovation for the ultimate benefit of the public.⁸¹

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

creates useful products for the public's benefit." (quoting Patricia A. Lacy, *Gene Patenting: Universal Heritage vs. Reward for Human Effort*, 77 OR. L. REV. 783, 797 (1998)) (footnote omitted).

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

76. See Mike Dillon, *Tax on Innovation*, THE LEGAL THING, Sept. 14, 2006, http://blogs.sun.com/dillon/entry/congressman_smith_comes_to_town (general counsel for Sun Microsystems commenting on lost revenue attributed to patent trolls).

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

78. See 15 U.S.C. § 2 (2000) (imposing restrictions on the formation of monopolies and on the conspiracy to form monopolies); 35 U.S.C. § 271(a) (2000) (imposing restrictions on the production, use, sale, and importation of patented inventions).

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

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

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

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

83. Barfield & Groombridge, *supra* note 56, at 214.

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ing property-based remedies for patent infringement⁸⁴ while the pharmaceutical industry supports strengthening property-based remedies.⁸⁵

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

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

84. See, e.g., Brief for Business Software Alliance et al. as Amici Curiae Supporting Petitioners at 4, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 338 (2006) (No. 05-130) (urging the Court to adopt an equity-based test to determine whether to grant an injunction as opposed to the current practice of automatically issuing an injunction upon a showing of infringement); Brief for Nokia Corp. as Amici Curiae Supporting Petitioners at 5–6, *MercExchange*, 547 U.S. 338 (No. 05-130) (arguing for reversal of the Federal Circuit's automatic injunction rule in favor of an equity-based test).

85. See, e.g., Brief for Pharmaceutical Research and Manufacturers of America as Amici Curiae Supporting Respondents at 2–3, *MercExchange*, 547 U.S. 338 (No. 05-130) (arguing against reversal of the automatic injunction rule in order to preserve strong patent protection and thereby safeguard the incentive to innovate).

86. See Barfield & Groombridge, *supra* note 56, at 213 (outlining the factors which make tailoring patent systems to individual products difficult).

87. Richard A. Epstein & F. Scott Kieff, *Flexible Patent Law . . . and Its Achilles Heel*, WALL ST. J., May 11, 2007, at A9 (warning against making patent law flexible because it creates uncertainty, increases bureaucrat discretion, and advantages companies with sizeable lobbying and litigation budgets).

88. Compare Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, Jun 28, 2007, http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline/1 (“[T]he record business has plunged into a historic decline.”), with iTunes Music Store Sells Over One Million Songs in First Week, <http://www.apple.com/pr/library/2003/may/05musicstore.html> (last visited Sept. 21, 2008).

89. Barfield & Groombridge, *supra* note 56, at 213–14 (discussing the inability to create an industry-specific patent system because the information required to do so is constantly shifting—demand, R&D costs, market structure—and thus generally unobtainable).

90. See *Randall v. Sorrell*, 548 U.S. 230, 243–44 (2006) (stating that stare decisis is “the basic legal principle that commands judicial respect for a court’s earlier decisions and the rules of law they embody. . . . Departure from precedent is exceptional, and requires ‘special justification.’ . . . This is especially true where . . . the principle has become settled through iteration and reiteration over a long period of time.”) (citations omitted). See generally David M. Becker, *Debunking the Sanctity of Precedent*, 76 WASH. U. L.Q. 853, 854–55 (1998) (discussing the importance of certainty in law to ensure predictability).

91. John S. Brown, *Research that Reinvents the Corporation*, HARV. BUS. REV., Aug. 2002, at 105, 105 (citing rapid technological changes and unsteady business markets as forces propelling the need for constant innovation, not only in product development but also in business practices and processes).

92. See Chapin, *supra* note 75, at 233–34 (identifying three methods—standard setting bodies, cross license agreements, and open source—that the software industry is currently using to ensure interoperability despite the increasing difficulty to do so in light of patent-related costs, namely costly licensing fees to avoid infringement).

PATENTS ARE PROPERTY: A FUNDAMENTAL BUT IMPORTANT CONCEPT

rise in fuel costs have impacted businesses by increasing overall costs which may be difficult to pass onto consumers in the current weak economy.⁹³ The airline industry has been greatly impacted by higher fuel costs.⁹⁴ Nevertheless, some airlines have weathered the impact by effectively using financial transactions to hedge fuel costs.⁹⁵ Likewise, advances in digital technology coupled with widespread availability of high speed Internet connections have ravaged certain segments of the entertainment industry.⁹⁶ The number of brick and mortar stores selling music on CDs⁹⁷ and the number of video rental stores has precipitously declined over the last few years.⁹⁸ Both types of stores are likely to disappear in the future or be reduced to serving a niche market.⁹⁹

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

93. Compare Donna Kardos, *Baggage Fees, Job Cutbacks at Northwest*, WALL ST. J., July 10, 2008, at D4 (announcing that facing higher fuel costs, Northwest plans to cut jobs, charge for checked baggage, and raise ticket prices), and Peter Pae, *American Airlines to Charge for Checked Baggage*, L.A. TIMES, May 21, 2008, <http://travel.latimes.com/articles/la-trw-american22-2008may22> [hereinafter Pae, *American Airlines*] (announcing that due to climbing fuel prices, American Airlines plans to charge for checked bags, reduce domestic flights, and cut jobs), with Peter Pae, *Southwest Airlines Reaps Benefits of Fuel Hedging Strategy*, L.A. TIMES, May 30, 2008, <http://articles.latimes.com/2008/may/30/business/fi-southwest30> (noting that while other airlines raise prices, charge for baggage, and lay off workers, Southwest is dropping prices due to the company's aggressive fuel hedging strategy).

94. Aaron Smith, *Airlines Hit Another Rough Spot*, CNN MONEY, July 14, 2008, http://money.cnn.com/2008/07/11/news/companies/airline_index/ (reporting that the AMEX Airline Index dropped to the lowest point in its thirteen year history).

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

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

97. Hiatt & Serpick, *supra* note 88.

98. Campbell, *supra* note 96.

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