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REGULATION was first published in July 1977 "because the extension of regulation is piecemeal, the sources and targets diverse, the language complex and often opaque, and the volume overwhelming." REGULATION is devoted to analyzing the implications of government regulatory policy and its effects on our public and private endeavors.

A Final Response to Menell

At this point, I am at a loss to know how to reply to Peter Menell ("Intellectual Property and the Law of Land," Winter 2007–2008), who introduced a *deus ex machina* to salvage his inaccurate summarization of my published work.

His initial broadside ("Intellectual Property and the Property Rights Movement," Fall 2007) drew no distinction, express or implied, between my 2001 Harris lecture that appeared in the *Indiana Law Review* and my 2006 speech to the Progress & Freedom Foundation, later published as the paper "The Structural Unity of Real and Intellectual Property," that is now said to contain "my more strident position" on intellectual property. It is worth noting that he quotes not a single sentence from either paper to mark my supposed shift, which in fact never took place.

Compare two excerpts from the two papers and ask which comes from which:

Excerpt 1:

I begin with a cautionary note. This line of attack will only work if one brings the right level of sophistication to the rules of physical property to which these [intellectual property] comparisons are made. The first step in that connection is to avoid falling into what I sometimes call the "Blackstone Trap."

[Blackstone's] ringing rhetoric... does not quite square with the evolution of property rights on the ground, which shows a consistent evolution that starts from Roman law and works through its English and American permutations. The absolute right to exclude has never stated the actual position of any legal system over land, and especially over water. The boundary lines are often fuzzy not fixed, and water rights in particular constantly stress various communal rights. The question then arises whether there is any pattern that explains those deviations from the absolute right to exclude. It turns out there is and it comes in two related parts. The first of these deals with the dangers associated with the fragmentation of property rights, particularly in certain kinds of properties. The

second deals with the concentration of property rights, which often arise in tandem.

Excerpt 2:

I don't think that it's going to take much to persuade anyone that Intellectual Property law is noted not only for its complexity but also for its tremendous internal diversity. Broadly speaking, Intellectual Property comprehends at least five or six separate areas: patents; copyrights; trade names and trade marks; trade secrets; the protection of name and likeness, a largely common law right which today travels under banner of "the right of publicity"; and finally, all sorts of niche rights such as the quasi property in news that was recognized (if not created) in *International News Service v. Associated Press*.

The compilation of this list must be accompanied by a stern warning: The mere fact that [intellectual property] law subsumes these six separate fields does not guarantee that any proposition that holds good for one of these areas will necessarily carry over to a second. In every case, it is just as critical to attend to the differences between these particular systems of regulation on matters of doctrinal organization and administrative organization.

Looking at this treasure trove of analogies, it is useful for lawyers to disabuse themselves of a tendency which I like to call, and which others have called, Blackstone's fixation with the land paradigm.

Note that both quotes disavow any reliance on the Blackstone model. The first piece is from the 2006 Progress & Freedom Foundation paper; the second is from the 2001 *Indiana Law Journal* paper. The same theme is found in other papers that I have written, including my 2006 paper "Intellectual Property for the Technological Age" written for the National Manufacturing Institute.

Turning briefly to one point of substance: Professor Menell disparages my reliance on the encroachment cases in real property for "failing to take note of more

modern and less absolutist good faith improver statutes and doctrines.” There is nothing modern about the good faith improver; it has been a staple in the property literature from Roman times. Those cases do properly involve the use of flexible standards when there is an innocent improvement by Person A on the land of Person B that cannot be reversed without destroying value. But the California Civil Procedure Code §871.1 that adopts these standards states categorically in §871.6: “Nothing in this chapter affects the rules of law which determine the relief, if any, to be granted when a person constructs on his own land an improvement which encroaches on adjoining land.”

Nor does anything in the joint brief I authored with Kieff and Wagner in *eBay v. MercExchange* falsify that insight. Our explicit statement was:

Oftentimes the doctrinal explanation for this result is that the right in land is a right to exclude, period. But the functional explanation is that being tough in a small number of cases may cause needless disruption in them – but at the same time it produces a long-term systematic

gain because it reduces the number of infringements that take place.

Finally, I disagree with Professor Menell that relaxing injunctive relief for major and deliberate breaches can cure many of the other evident defects of the patent system attributable to poor claim definition, patent delays, or strategic litigation. Direct fixes for those defects are surely preferable to mucking around with the core protection of injunctive relief. In particular, recent proposals for “reasonable royalty” are a litigation disaster that will convert complex patent disputes into ratemaking hearings. The pricey settlement of the *Research in Motion* dispute goes against his point, for the transfer payment was not accompanied by any disruption in service.

Professor Menell has every right to disagree with my views on the propriety of injunctive relief in patent cases. But he distorts the conceptual framework within which I operate. Injunctive relief in patent cases makes sense even after we reject the Blackstone construction of property rights as absolute, exclusive, and perpetual.

RICHARD A. EPSTEIN
 University of Chicago Law School

Coroners and ‘The Big Kill’

The best professionals to consult about the possibility of deaths due to second-hand smoke (“Calculating the Big Kill,” Winter 2008) are the ones who deal with it daily. That is, coroners and medical examiners.

The largest county in the country by population is Los Angeles County, Calif. Its chief medical examiner/coroner, Lakshmanan Sathyavagiswaran M.D., explained the realities about secondhand smoke: “[W]e as medical examiners do not list ETS [environmental tobacco smoke] on death certificates since the present state of our knowledge and controversial aspects of ETS adverse health effects neither allow us to document ETS as a direct cause of death nor to establish to a reasonable degree of medical certainty the role of ETS as a contributory cause of death.”

Presumably thousands more medical examiners and coroners are in agreement.

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 Woodland Hills, Calif.

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