

Should intellectual property be accorded the same protections as tangible forms of property?

Intellectual Property and the Property Rights Movement

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The property rights movement (PRM) has taken active interest in several Supreme Court cases over the past few years. It was hardly surprising to see PRM activists mobilize in support of Susette Kelo, whose home was condemned by the city of New London. She argued that condemning her property to convey it to a private developer did not constitute “public use” and hence violated her constitutional rights. Ms. Kelo’s plight fell squarely within PRM’s core agenda of safeguarding the liberty interests of property owners against governmental interference. Nor was it surprising to see PRM organizations mobilize in *Rapanos v. United States*, involving the scope of federal authority to regulate wetlands; *San Remo Hotel v. City & County of San Francisco*, challenging the constitutionality of a hotel conversion ordinance under the Takings Clause; *Lingle v. Chevron U.S.A.*, seeking to overturn a state statute limiting the rent that oil companies could charge dealers leasing company-owned service stations; or *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, asserting that a temporary moratorium on development effected an unconstitutional taking of private property.

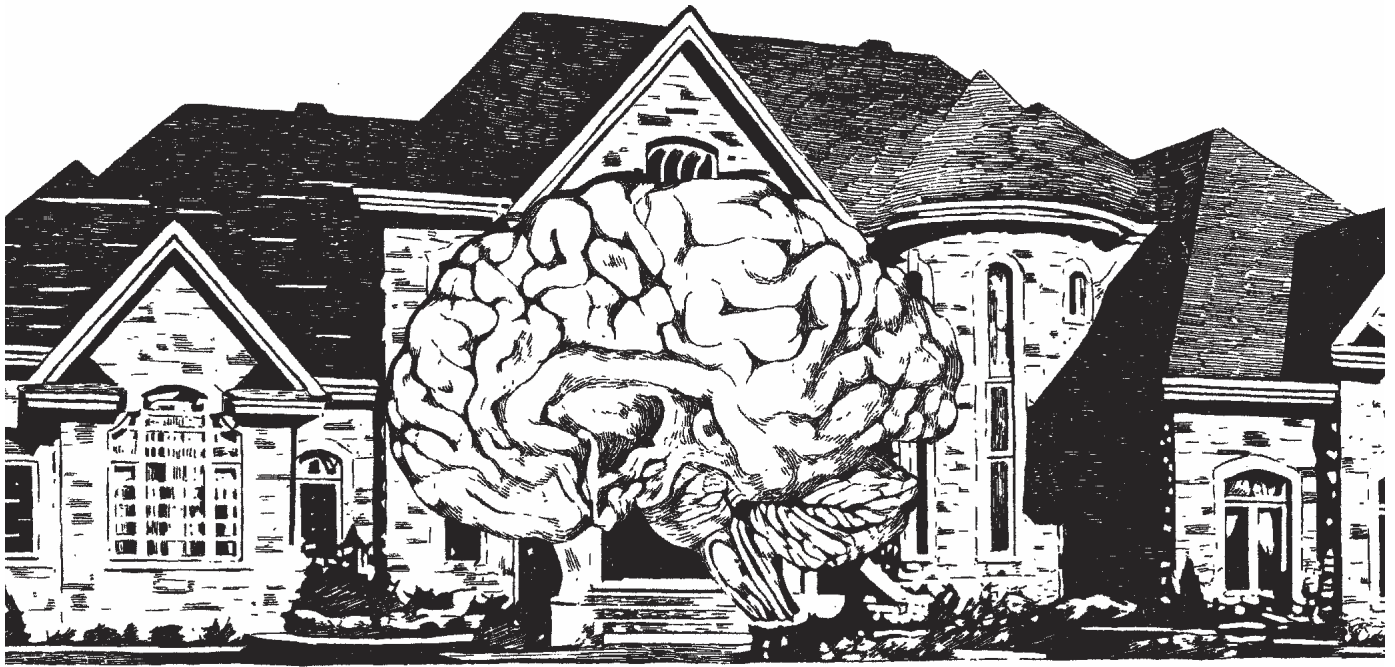
By contrast, *eBay v. MercExchange* did not seem to fit the PRM mold. The “property” at issue — a patent on a method of selling goods through an “electronic network of consignment stores” — could hardly have been more different in character and economic underpinning than Susette Kelo’s home. MercExchange had prevailed in a patent infringement action and

sought to enjoin eBay, the popular online auctioneer, from further use of the patented method in the hope of forcing a favorable licensing deal. The patentability of such methods was itself quite controversial because of the abstract nature of business method claims. Furthermore, the governmental “interference” with the patent owner’s property was limited. The district court denied MercExchange’s request for a permanent injunction based on the patent owner’s willingness to license to other parties, the adequacy of monetary damages, the fact that the patentee did not itself practice the invention, and “growing concern” over the effects of business method patents on competition and innovation. The U.S. Court of Appeals overturned the denial of the permanent injunction, holding that, as a “general rule,” injunctions must follow all patent infringement findings absent “exceptional circumstances” such as a grave risk to public health. As a result, eBay appealed to the Supreme Court, which granted certiorari in late 2005.

In an amicus brief filed in the Supreme Court on behalf of “various law and economics scholars,” Prof. Richard Epstein, one of the PRM’s leading theorists, contended that the Merc-Exchange patent deserved much the same protection as real estate. By analogizing patent infringement to trespass, the brief argued that injunctive relief should be presumed in cases of patent infringement. It pushed the boundaries of patent law advocacy by citing land encroachment precedent.

The property rights rhetoric in the *eBay* case marked an important new front in the campaign to establish a strict and broad interpretation of property rights and their enforcement. Professor Epstein’s expansion of his property rights advocacy into the intellectual property domain over the past

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several years coincides with the growing importance of intangible assets in the modern economy. The digital revolution has displaced General Motors and other manufacturing enterprises from the top of the economic food chain. Knowledge-based companies such as Google, Microsoft, and Apple reflect the new economic order.

Other property rights advocates have joined the effort to “port” the absolutist libertarian vision to the realm of intellectual property. In a May 21, 2007 op-ed page advertisement in the *New York Times*, the Washington Legal Foundation led:

Stolen Property, Stolen Future

What if strangers showed up in your backyard and held a block party? America’s fiercely defended tradition of private property rights wouldn’t tolerate this. But that is in essence what’s happening to the intellectual property ... of American businesses overseas.

Should “intellectual property” be so blithely equated with tangible forms of “property”? While there are certainly historical connections and functional parallels between “intellectual property” and “property,” philosophical, legal, economic, and political bases for protecting intellectual property and tangible property differ in significant ways. Those underpinnings suggest that the effort to bring intellectual property into the “property” tent may well backfire.

SEMANTICS AND SUBSTANCE

Private property in land and other tangible resources is perhaps the oldest human institution and has long occupied a prominent position in law and philosophy. But to what extent does intellectual property — rights in intangible resources — fall within the relatively uniform right structure applied to land and other tangible resources?

The law has long treated land and intellectual property within the general rubric of “property.” The first use of the

term “intellectual property” in a reported legal decision can be traced to an 1845 patent case in which the court observed that “a liberal construction ... given to a patent” will encourage “ingenuity and perseverance” and “only in this way can we protect *intellectual property*, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.” Prof. Justin Hughes, in a recent *Southern California Law Review* article, notes that “the courts and legislatures had regularly discussed copyrighted works as ‘property’ throughout the seventeenth, eighteenth, and early nineteenth centuries, with the adjectival concepts of ‘artistic,’ ‘literary,’ and ‘intellectual’ orbiting around the property notion.”

There can be little question today that intellectual property assets are forms of “property.” The Patent Act expressly declares that “patents shall have the attributes of personal property” and the Supreme Court acknowledges them as such. The Copyright Act states that “ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as *personal property* by the applicable laws of intestate succession.”

But the classification of patents, copyrights, trademarks, and trade secrets as forms of “property” does not resolve the contours of those assets and the rights and protections that their owners enjoy. Property is not a monolithic concept and its treatment varies significantly across classes of resources. The critical question is not whether the rubric “property” applies to intellectual property, but whether the traditional rights associated with real and other tangible forms of property apply to intellectual property.

Professor Epstein and some other PRM advocates assert that the rules associated with real property (such as a strict right to exclude and restrictions on governmental interference) should govern intellectual property. Those scholars would shoehorn intellectual property into an idealized Blackstonian

conception of property rights as exclusive and inviolate. Yet such a classification is more semantic than actual. The two fields derive from different philosophical foundations, embody different rules and institutions, and reflect different political constituencies.

PHILOSOPHICAL DIFFERENCES

John Locke believed that every man has an inherent property interest in his own person and, by extension, in the labor of his body, subject to there being “enough, and as good left in common for others.” Upon this foundation, Locke asserted “life, liberty, and property” to be inalienable rights of a just society.

Drawing upon Locke’s natural rights conception of property, the Property Rights Movement advocates an absolutist approach to the protection of property rights and strict limitations on government interference with private property. Notwithstanding the Founders’ varied views of private property — such as Benjamin Franklin’s view that “Private Property ... is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing” — the property rights movement sees in the Constitution’s Takings Clause uncompromising protection of property, founded in liberty.

By contrast, patents and copyrights emerged largely through legislative enactments pursuant to a specific utilitarian constitutional directive: “to promote the Progress in Science and the useful Arts.” Although the documentary history relating to this clause is sparse, there can be little question that the Founders saw the Intellectual Property Clause functioning quite differently than the Takings Clause. In an address to Congress on January 8, 1790, President George Washington noted:

[T]here is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is, in every country, the surest basis of public happiness. In one in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionably essential.

In response, the newly formed House of Representatives resolved: “We concur with you in the sentiment that . . . the promotion of science and literature will contribute to the security of a free Government; in the progress of our deliberations we shall not lose sight of objects so worthy of our regard.” In the spring of that year, Congress passed the first federal patent and copyright laws.

UTILITARIAN APPROACH

Rather than emulate real property rules and institutions, intellectual property can best be understood as a malleable bundle of rights to be molded to promote the progress of science and the arts. Indeed, the various modes of intellectual property protection diverge significantly from Blackstone’s model of absolute rights — perpetual, exclusive, and inviolate. Two of the most prominent forms of intellectual property — patents and copyrights — protect works for limited durations

(although in the case of copyrights, the term is quite long). Furthermore, exclusivity in the field of “intellectual property” is far less inviolate than it is in the traditional property domains. Intellectual property law comprises a system of policy levers that legislatures tailor and courts interpret in order to promote innovation and protect the integrity of markets in light of the ever-changing state of technology as well as social institutions.

Patent law’s experimental use defense and various exceptions (e.g., severe restrictions on enforcement of medical procedure patents, prior user rights for business methods) limit the exclusivity of patent rights. Copyright law’s fair use doctrine, numerous compulsory licenses, and various exemptions significantly qualify the exclusivity of copyright interests. Trademark law’s distinctiveness doctrine, infringement standard, and nominative use defense significantly constrain the exclusivity of trademark rights. Trade secret law’s independent discovery defense similarly qualifies the exclusivity of such rights. Upon even casual inspection, the “property” label serves primarily to signify that intellectual property rights are ownable and transferable.

Nonetheless, classification of intellectual property as “property” has substantive effect in some contexts. The Fifth Amendment limitations on takings of private property turn on that classification. But as reflected in the *eBay* case, the “property” label is not determinative of the standard for injunctive relief.

Unlike Locke’s liberty conception of real property, the principal economic justification for intellectual property derives from a broader economic problem: the inability of a competitive market to support an efficient level of innovation in some areas of technological innovation and creative expression — particularly those in which research and development (R&D) is costly, innovation is easily perceived, and imitation is relatively inexpensive and can occur rapidly. A competitive economy will drive profits to zero, not accounting for sunk costs such as R&D. Although imitation keeps prices low for consumers and avoids deadweight loss of monopolistic exploitation, it produces a suboptimal level of investment in R&D. Most firms would not invest in developing new technologies and creative works if rivals could enter the market and dissipate the profit before R&D costs adjusted for attendant risks could be recovered.

Unlike tangible goods, knowledge and creative works are public goods in the sense that their use is nonrivalrous. One agent’s use does not limit another agent’s use. Indeed, in its natural state, knowledge is also “nonexcludable.” That is, even if someone claims to own the knowledge, it is difficult to exclude others from using it. Intellectual property law is an attempt to solve that problem by legal means; it grants qualified exclusive use of the protected knowledge or creative work to the creator.

Such control, however, reduces social welfare in several ways. First, monopoly exploitation results in deadweight loss to consumers. Second, exclusive control may inhibit the use of scientific or technological knowledge for further research. Third, from an ex ante point of view, there is no guarantee that the research effort will be delegated to the most efficient firms, or even to the right number of firms.

Patent protection, for example, seeks to balance those competing effects by affording protection only to substantial (non-obvious) inventions, limiting the term of protection, and requiring that the inventor fully disclose the invention. In the most basic model of patent protection — where inventions do not serve as building blocks for later inventions and the only control variable is the duration of protection — the optimal duration of patent protection balances the incentives for innovation against the deadweight loss of monopoly exploitation.

Cumulative innovation — where first-generation inventions become inputs for second-generation innovators — substantially complicates the design of patent protection. In order to reward first-generation innovators sufficiently for inventions that may produce positive spillovers by enabling second-generation inventions (improvements, new applications, and accessories), first-generation innovators should be able to appropriate the value of second-generation innova-

tional economists see vibrant competition as a more positive force in spurring invention, innovation, and diffusion of technology than coordinated development by a single prospector. For this reason, narrower and weaker rights structures may be more efficacious in promoting innovation in particular fields. Even Prof. William Landes and Judge Richard Posner recognize that “deproertizing’ intellectual property may sometimes be the soundest policy economically.” Professors James Bessen and Michael Meurer find, for example, that the costs of business method and software patents (attributable to the inherent ambiguity of rights boundaries) generally outweigh the relatively modest benefits of such patents.

STRUCTURAL UNITY OR UTILITARIAN DESIGN

When Professor Epstein looks at intellectual property, he is struck by the “structural unity” with real property. He sees exclusivity and the right to transfer as the foundations under-

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tions. On the other hand, providing even a share of the second-generation innovators’ returns to the first generation innovator reduces the incentive for second-generation innovators to pursue their research. This tension is abated to the extent that first-generation innovators are best positioned to pursue second-generation innovation or where collaboration (e.g., joint ventures) brings first- and second-generation innovation within the same profit center.

The cumulative nature of innovation unquestionably strengthens the case for allowing joint ventures, especially with respect to complementary products. In practice, however, one entity rarely is best positioned to pursue all second-generation projects. Furthermore, second-generation innovators are not known (and cannot be knowable) before the making of first-generation research investments. Yet, once first-generation research investments are made, they are sunk costs that become irrelevant for bargaining over the division of profits from multi-generation innovation. This problem can be addressed by expanding the duration and scope of first-generation patents or by denying patent protection altogether to second-generation innovation. The results, however, depend critically upon strong assumptions relating to licensing of innovation and the knowledge and rationality of innovators. In practice, there are many strategic impediments to licensing. In addition, innovators rarely possess good information for assessing the best diffusion path for their technologies and licensing can be costly.

The utilitarian linkage between property and intellectual property theory hinges upon low transaction costs. Institu-

girding both systems, while discounting the problems of fragmentation and concentration in both domains. His limited perspective exaggerates the “unity” of real and intellectual property with regard to exclusivity and freedom to transfer while overlooking the many structural differences that distinguish real and intellectual property.

There is little doubt that intellectual property rights can be exclusive. But they need not be and often are not, at least not to the extent associated with real property. Exclusivity in the realm of real property addresses the “tragedy of the commons.” Providing exclusive rights to land and other tangible resources limits the overuse of inherently depletable resources. By contrast, intellectual resources (knowledge) are not depletable and hence are not subject to overuse externalities. Treating them as real property can lead to underutilization. We can all enjoy a Mozart opera without diminishing the enjoyment of others, whereas we could not all productively graze our herds on a given acre of land or enjoy a particular chocolate ice cream cone without adversely affecting the use and enjoyment of others. Intellectual property protections use the provision of rights (of varying degrees of exclusivity) to promote technological innovation and expressive creativity. But as noted earlier, progress in technology and the arts is a cumulative process in ways that development of land is not. Intellectual property laws seek to balance the interests of pioneering innovators and subsequent improvers in the pursuit of progress.

Exclusive rights of the character associated with real property would stand in the way of technological and expressive progress in many areas of creativity. Thus, Congress has not

declared the first inventor the fee-simple absolute owner of his intellectual creativity. To do so would violate the Constitution's "limited time" condition. But putting that attenuated constraint aside, Congress has limited the duration and the rights of intellectual property owners in significant respects to achieve an appropriate balance between incentives to create and opportunities for later improvers.

Patent rights tend toward the more exclusive end of the control spectrum, although the relatively short duration of patent protection (20 years from the filing of an application) and the ability for subsequent inventors to patent improvements (although they will need to license underlying patented inventions in order to practice their improvements) mitigate such strength. Copyright law takes a more varied approach to exclusivity. At the most basic level, copyright law allows independent creation of copyrighted works. The statute includes numerous exceptions, compulsory licenses, and other limitations on copyright owners' rights in the service of cumulative creativity and other social ends. Trademark law goes further yet, allowing a broad range of uses of valid trademarks by news organizations as well as competitors (comparative advertising) and parodists. Trade secret law does not prohibit reverse engineering or independent creation of information protected as trade secrets.

Courts have long recognized inherent limits on exclusivity of intellectual property rights. In the early 19th century, Justice Story wove the doctrines of experimental use and fair use into the patent and copyright regimes. Jurists since that time have embellished upon those doctrines in the pursuit of the appropriate balance between protection and unauthorized use. Thus, it is a substantial exaggeration to suggest that "exclusivity" of rights in the intellectual property context mirrors that concept in the real property context.

The transferability of intellectual property rights also diverges from the real property model in significant respects. The patent and copyright misuse doctrines, for example, limit the freedom of intellectual property owners to leverage their rights into other markets or to inhibit innovation. Trademark law imposes substantial restrictions on assignment and licensing. Antitrust law plays a much greater role in policing intellectual property licensing than in real property transactions.

Beyond exclusivity and transferability, the structures of real and intellectual property differ markedly along several other critical dimensions. The PRM generally believes that most, if not all, tangible resources should be owned. Yet intellectual property law tends to operate from the opposite default — market failure justifies intellectual property protection and intellectual property rights should only be created to the extent needed to override appropriability problems. Patent law excludes protection for abstract concepts and scientific principles. Copyright law does not extend to unoriginal compilations, even when they require substantial effort. Patent and copyright aspire for knowledge to be unowned — in the public domain — after their term has expired. The same cannot be said for tangible property systems.

A further structural difference between real and intellectual property relates to the nature of boundaries and the implica-

tions for transaction costs. Whereas tangible property can usually be defined with reasonable clarity and can be verified at relatively low cost, various types of intellectual property — especially software and business method patents — have notoriously fuzzy boundaries. Such boundary definition problems, and the due diligence, transaction, and dispute resolution costs that they entail, raise serious questions about the desirability of some types of intellectual property.

Real and intellectual property differ significantly in terms of enforcement costs. Whereas land and other forms of tangible property can be enclosed and monitored, the flow of knowledge is particularly difficult to observe. For that reason, trade secrets are notoriously difficult to protect. Digital technology and the Internet have made the products of traditional content industries — sound recordings, sheet music, movies — much more vulnerable to unauthorized distribution. Professor Epstein's equation of real and intellectual property skates over those significant differences.

LIBERTARIAN DISCORD

Libertarianism exhibits profound schizophrenia with regard to the concept of intellectual property. Whereas Professor Epstein sees nearly every resource — whether tangible or intangible — as property that should be protected by exclusive rights, many libertarians have serious reservations about extrapolating property rights in tangible resources to the realm of intangibles. Friedrich Hayek, perhaps the most influential libertarian theorist of the 20th century, raised serious doubts about the equation of tangible and intangible resources. In *The Fatal Conceit*, he wrote:

The difference between [copyrights and patents] and other kinds of property rights is this: while ownership of material goods guides the use of scarce means to their most important uses, in the case of immaterial goods such as literary productions and technological inventions the ability to produce them is also limited, yet once they have come into existence, they can be indefinitely multiplied and can be made scarce only by law in order to create an inducement to produce such ideas. Yet it is not obvious that such forced scarcity is the most effective way to stimulate the human creative process.

Along those lines, several libertarian theorists see scarcity, and not the act of creation, as the fundamental justification for property rights. They view the recognition of property-type rights in intellectual creativity as inhibiting the freedom of others to use tangible resources and to engage in free expression. They worry that intellectual property impedes the process of creative destruction that moves society forward.

The concern over such freedom took root within the computer programming field in the 1980s. Prior to that time, computer programmers enjoyed largely unfettered freedom to use and adapt computer code. Competitive pressures, however, led computer vendors to assert greater control over the use of software. Such restrictions spurred Richard Stallman, a researcher in the Artificial Intelligence Laboratory at the Massachusetts

Institute of Technology, to develop a technical and legal strategy aimed at restoring freedom to use and adapt computer code. That effort grew into the open source movement, a collaborative production and design framework that eschews proprietary restrictions on innovation. Over the past decade, a phalanx of “cyberlibertarians” has questioned the role of intellectual property in cyberspace.

Thus, libertarians are deeply divided on whether, and in what circumstances, intellectual property recognition is justified. Professor Epstein cannot claim the libertarian mantle on such questions.

POLITICAL DIFFERENCES

Stepping away from the above philosophical issues, a number of interesting political dynamics surround intellectual property and the PRM. Below are comments on some of those dynamics.

The PRM closely aligns with conservative, anti-government Republican politicians and political action groups. Intellectual

intervention. As ecologists and scholars from Pinchot to Leopold to Sax have emphasized, however, the interdependency of land and other natural resources cannot be denied and such interdependency justifies a governmental role in resource policy. The case for governmental intervention and collective limitations on land and resource use expands with the pressures of population density and resource use, collective interests in resource management and stewardship, and the accretion of scientific knowledge about human impacts on ecosystems. Bringing intellectual property into the “property tent” will call attention to the interdependency conception of resources.

Several characteristics of intellectual resources and the nature of innovation bear this out. First, the cumulative nature of innovation means that almost all innovations are linked to other innovations to some degree. Inventors today “stand on the shoulders of giants” in pushing the frontiers of science and technology. A similar phenomenon connects expressive creativity. Authors, artists, and musicians build on and respond to the creativity of those who came before. Therefore, intel-

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property owners, by contrast, reflect a much wider range of political stripes. Information technology companies are relatively agnostic regarding political allegiance, whereas the pharmaceutical industry has been more aligned with the Republican Party. Content industries have long maintained closer ties with Democratic lawmakers and administrations. Hollywood producers, directors, and actors have generally favored Democratic politicians and causes — such as the environmental movement.

The foregoing suggests that the property rights movement and intellectual property interests are unlikely to build deep or stable political ties. Although they both see “property rights” as key to their future, their conceptions differ markedly. The PRM’s absolutist view of property rights contrasts with the much more flexible and pragmatic needs of a dynamic and effective intellectual property rights system.

PROTECTION OF REAL PROPERTY

Will trying to expand the “property tent” to include intellectual property promote the PRM’s goals of strengthening property rights and minimizing government interference with free markets and individual liberty? Conceiving of intellectual property and real property in the same frame of reference seems more likely to lead in exactly the opposite direction from where the PRM seeks to go — that is, the notion that individual land parcels can be viewed as discrete islands without any ecological or social interdependency that might justify governmental

lectual property policy correctly resists the conception of intellectual resources as discrete and insular. Intellectual resources are inherently interdependent. In this way, intellectual resources come closer to the Leopoldian conception of the land resource as being a web of interrelated elements than it does to the PRM conception of every parcel as an island. Granting strong, exclusive rights to inventors and authors rests on unrealistic optimism about transaction costs. Coasean bargaining is unlikely to provide the optimal usage and advance of knowledge in all circumstances.

That is not to say that property rights have no role to play in promoting progress. They play an essential role, but care must be taken to tailor the scope of protection, rights, and remedies to particular creative contexts. Dogmatic belief in the most extensive bundle of property rights overlooks much of the challenge of spurring technological and expressive creativity.

Second, the optimal system for promoting creativity changes with society and technology. The optimal system for promoting traditional pharmaceutical innovation might not be appropriate for genomic research. Similarly, the appropriate balance for copyright protection in the era of mechanical reproduction of works of authorship might not be optimal for the digital age. Further, the digital age will continue to evolve, requiring adjustments in the intellectual property system. The need for legal rules and institutions to adapt to such dynamism will push against the PRM’s static conception of

property rights. The need to evolve intellectual property systems could be hampered by an overly restrictive interpretation of the Takings Clause.

Third, the trend of digital technology toward greater collaborative creativity and costly enforcement seems unlikely to support traditional conceptions of ownership and control. A growing number of successful business models on the Internet downplay proprietary rights and use ancillary methods for deriving revenue. We increasingly see open source development of infrastructure, advertising-supported content and services, and keyword advertising. The debate over “network neutrality” parallels debates over public provision of highways and other resources. Because of the inherent nature of network resources, the PRM will face an increasingly uphill battle trying to colonize cyberspace. Other economic models — such as open source — will undoubtedly play a major role in this domain.

Witness the resolution of *eBay v. MercExchange*. At oral argument, the property rights rhetoric seemed to attract the attention of Justice Scalia:

[W]e’re talking about a property right here and the property right is explicitly the right to exclude others from use of that. That’s what a patent right is. And all he’s asking for is give me my property back.

In the end, however, even the Supreme Court’s most stalwart property rights defenders resisted the effort to pull intellectual property into the traditional property tent. In a unanimous decision authored by Justice Thomas, the Court ruled that injunctions should not be presumed in patent cases; rather courts should exercise equitable discretion in determining relief. Chief Justice Roberts’s concurrence, joined by Justices Scalia and Ginsburg, no doubt gave the PRM some solace by noting that the “long tradition of equity practice” of granting injunctive relief in the vast majority of patent cases upon a finding of infringement reflects “the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee’s wishes.” But Justice Kennedy, in a concurrence joined by Justices Stevens, Souter, and Breyer, offered a more nuanced and flexible approach toward the exercise of discretion in enforcing intellectual property rights by emphasizing the particular characteristics of business method patents. Only time will

tell how strongly intellectual property rights will be enforced, although early lower court decisions applying *eBay* suggest that a shift away from near-automatic issuance of injunctions in patent cases is underway.

Thus, the growth of intellectual property seems unlikely to support the PRM’s core agenda. Intellectual property has never fit the real property mold particularly well and the inherent attributes of intellectual resources as well as the increasingly interdependent nature of information ecosystems points away from the PRM’s conception of property. By expanding the property tent to encompass intellectual property, property rights enthusiasts run the risk of diluting the distinctive attributes of real property that brought it special attention at the founding of the nation. Such a conception has been on the decline and the growing importance of intellectual property seems likely to hasten that trend. As Justice Benjamin Cardozo remarked in describing the development of water rights in the American West, “Here we have the conscious departure from a known rule, and the deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel and cut a new one for itself.” The rise of intellectual property, like water resources, highlights both the complexity and interdependence of resources in modern societies. Efforts to shoehorn legal protection for such resources into the real property mold will undoubtedly fail and may well hasten the demise of the rigid conception of private property rights in land and other tangible resources.

CONCLUSION

The property rights movement is too limited and grounded in absolutist ideology to support the needs of a dynamic, resource-sensitive intellectual property system. It is not particularly helpful to think of real and intellectual property as “structurally unified.” To the contrary, the landscape of intellectual property itself is quite variegated. Functionally-oriented property rights analysis can be useful to legal and policy debates, but property rights rhetoric is misleading philosophically, historically, and functionally. Suggesting that “intellectual property” must be treated as part of a monolithic “property” edifice masks fundamental differences and distracts attention from critical issues. **R**

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