

A reply to Richard Epstein

Intellectual Property and the Law of Land

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In his response (pp. 58) to my Fall *Regulation* article “Intellectual Property and the Property Rights Movement,” Professor Richard Epstein misses the gist and key implications of my essay on the extension of the “property” tent to encompass intellectual property.

His article implies that I lack sympathy for Susette Kelo’s plight, yet my original article is agnostic about the Supreme Court decision expanding what constitutes the public use requirement. I merely highlighted the stark difference between the *Kelo* case and *eBay v. MercExchange*. I also did not take issue with the enforcement of intellectual property laws to combat the threats to public health posed by counterfeit drugs and surgical devices. Rather I observed that some property rights activists who seek to enforce those intellectual property rights uncritically deploy property rhetoric to advocate their cause. My essay purposefully does not place nearly as much emphasis on Professor Epstein’s 2001 *Indiana Law Review* article as he would like — for reasons that will become clear below (but I did include the article in my “Readings” list). While attacking points that I did not make, Professor Epstein makes no reference to the clear target of my essay: the views he espoused in his 2006 Progress & Freedom Foundation paper “The Structural Unity of Real and Intellectual Property.” That same argument, in advocate’s garb, appears in Professor Epstein’s recent *eBay* brief.

Let us consider the key issues raised by my essay. My central point is that intellectual property deserves its own edifice. Professor Epstein’s response fully acknowledges that governance of intellectual property involves a complex public policy balance that differs in fundamental ways from the realm of real property governance, hence his opposition to the 1998 copyright term extension and his thoughtful concerns about the scope of gene patents. He also seems to acknowledge that the dynamism of technology justifies a more flexible legal and policy framework

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— as when he discusses *Intel v. Hamidi*. Yet he often contradicts those concerns, reverting to equating cyberspace with physical space or intangible property with tangible property

There are, to be sure, important similarities between the governance of intellectual property and real property, just as there are similarities between the governance of intellectual property and entitlement programs. But it is better to look to first principles of economic analysis and to comparative institutional analysis than to freighted analogies. I believe that the governance of all resources can usefully be understood within a dynamic, multi-institutional framework (see the 2002 article that I co-authored in the *St. Louis University Law Review*) — but that framework needs to be far richer than the version of the “land” system that Professor Epstein propounds. (This is reflected in his directing the Supreme Court to an anachronistic Blackstonian encroachment case in the *eBay* brief while failing to take note of more modern and less absolutist good faith improver statutes and doctrines.) Professor Epstein acknowledged as much in his 2001 article where he wrote: “The task of analogy becomes still more difficult when we deal with the law of animals, oil and gas, water rights (which itself is governed by multiple different regimes), or air rights.” What does he cite in support of this proposition? The 1998 textbook *Property Law and Policy: A Comparative Institutional Perspective* that I co-authored with John P. Dwyer. Epstein concludes by noting that “we can understand how and why [intellectual property] systems both follow on, and diverge from, the law of land.”

This is the key issue. My essay in the fall issue of *Regulation* questioned overreliance on claims of “structural unity” between real and intellectual property systems — a failing of Professor Epstein’s 2006 Progress & Freedom Foundation paper, not his 2001 law review article. Rather than respond to my criticism of his more strident 2006 position, Professor Epstein circles back to his earlier, more balanced view. If he is now saying that his 2006 paper does not really express his views, then that clarification is worth noting.

Professor Epstein entirely overlooks the more provocative claim in my essay — that “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 [Property Rights Movement] 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 government intervention.” Professor Epstein apparently finds that characterization a bit harsh (true — he does see the wisdom in “the relaxation of Blackstone rules with respect to overflight rights or electromagnetic transmissions” and necessity), but his writings and advocacy on takings jurisprudence as well as his broad brush approach to remedies in *eBay* do stress a particularly strong form of exclusivity and freedom of property owners from governmental regulation and exercise of discretion. I suggest that the dynamic aspects of technology and hence technology policy (including copyright protection as distribution platforms evolve) will push toward flexibility in rights structures that Professor Epstein has consistently and emphatically resisted. I suggest that “[e]fforts to shoehorn legal protection for

by patent law treating all inventions the same — everything from costly, time-consuming, and unpredictable pharmaceutical breakthroughs to prosaic business methods that can be hatched over a casual lunch with claims drafted by dinnertime.

Consider Research in Motion’s security of investment in its independently developed Blackberry technology when a questionable patent for wireless e-mail emerged and the non-practicing entity threatened to enjoin the vast enterprise. Had the district court taken a more flexible approach to remedies, there may have been an opportunity for the reexamination of the patent by the Patent Office to go forward. Instead, Research in Motion, facing a devastating loss from injunctive relief, settled the case for \$612.5 million.

Just as Professor Epstein praises water law for adjusting property rights to fit better the nature of the underlying resources, he should agree that the overly uniform structure of patent law across all innovation may be a significant problem. The remedy lever, appropriately developed through judicial fact-finding and the evolution of context-specific standards, can foster more appropriate incentives (calibrating rewards

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[intellectual property] 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.” The Supreme Court’s decision in *eBay* bears out at least part of that conjecture.

Professor Epstein invites me to say a bit more about the substance of the issues raised by the *eBay* case. Citing Hume, he sees security of expectations in voluntary transactions as the overriding principle for thinking about patent remedies. Like many observers of the patent system over the past decade, I am struck by the unprecedented expansion in patentable subject matter, the inherent problems of evaluating novelty and non-obviousness in the software and business method fields, the quality control problems of the Patent Office, the fuzzy boundaries surrounding many patents (compare the metes and bounds of a real property deed to the ambiguous phrasing of many software patent claims), the strategic use of patent litigation to derail or hold up new ventures, and the great uncertainty wrought by a system in which competitors might not learn about patents until after they have invested millions. All those problems are exacerbated

with creativity) without sacrificing the security of appropriate expectations. As I have suggested elsewhere (see my recent article in the *Michigan Telecommunications and Technology Law Review*), more fundamental adjustments to the patent system are called for to distinguish among the very different fields of inventive activity covered by patent law. But given the various political and other impediments to such a direct cure to the patent system’s root ills, more flexibility at the remedy stage looks to be a good utilitarian compromise. I doubt that courts will stand in the way of practicing or licensing patent holders enjoining infringers except in extraordinary circumstances (such as where de facto industry standards or antitrust concerns are present). The distinct possibility that non-practicing patent holders will be limited to a “reasonable royalty” (and if the current reform legislation passes, based only on their contribution to the market value over the prior art and the product’s other features — and not the product’s entire market value unless the patent’s contribution is the “predominant basis” for market demand for the product) rather than a rigid hold-up right seems to me a step in the right direction. **R**

Readings

■ “A Method for Reforming the Patent System,” by Peter S. Menell. *Michigan Telecommunications and Technology Law Review*, Vol. 13 (2007).

■ “Intellectual Property and the Property Rights Movement,” by Peter S. Menell.

Regulation, Vol. 30, No. 3 (Fall 2007).

■ “Intellectual Property: Old Boundaries and New Frontiers,” by Richard A. Epstein. *Indiana Law Journal*, Vol. 76 (2001).

■ “Reunifying Property,” by Peter S. Menell and John P. Dwyer. *St. Louis University Law*

Review, Vol. 46 (2002).

■ “The Structural Unity of Real and Intellectual Property,” by Richard A. Epstein. The Progress & Freedom Foundation, Aug. 21, 2006.