

## THE CONCEPTUAL RELATION BETWEEN IP RIGHTS AND INFRINGEMENT REMEDIES

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### INTRODUCTION

In its 2006 decision *eBay Inc. v. MercExchange, L.L.C.*,<sup>1</sup> the U.S. Supreme Court issued what on its face seems a narrow holding about remedies for patent infringement. Yet this holding (and two concurring opinions) sparked a major reconsideration about how property rights, remedial doctrines, and the commercialization of intellectual property (“IP”) all relate to one another. Before *eBay*, when IP holders proved that their patents were infringed on, there was a sense that they could get injunctions against continuing infringement relatively easily. Although different onlookers may disagree how much *eBay* unsettled that earlier sense, the case does unsettle that sense significantly.<sup>2</sup>

Although *eBay* raises many issues, one seems central: How exactly does the “property” in IP relate to the holder’s claims for monetary and (especially) injunctive relief? Lawyers, judges, and scholars assume there are two obvious possible answers; both were invoked in *eBay*. One answer was reflected in the Federal Circuit decision criticized and reversed by the Supreme Court: the right to exclude conferred by an IP right triggers as a strong presumptive consequence—in the Federal Circuit’s words, a “general rule”—that an IP holder get an injunction.<sup>3</sup> This approach is recognized in scholarship as well. Mark Lemley and Philip Weiser describe a common understanding whereby “[t]he foundational notion of property law is that ‘the right to exclude’ is the essence of a true property right. Using the clas-

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<sup>1</sup> 547 U.S. 388 (2006).

<sup>2</sup> See, e.g., 7 DONALD S. CHISUM, CHISUM ON PATENTS: A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY AND INFRINGEMENT § 20.04[2] (2009); Andrew Beckerman-Rodau, *The Aftermath of eBay v. MercExchange*, 126 S. Ct. 1837 (2006): A Review of Subsequent Judicial Decisions, 89 J. PAT. & TRADEMARK OFF. SOC’Y 631, 633 (2007) (“[T]he language used by some district courts suggests the *eBay* decision may not significantly effect whether those courts grant or deny permanent injunctive relief.”).

<sup>3</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006). See also Andrew Beckerman-Rodau, *Patents Are Property: A Fundamental But Important Concept*, 4 J. BUS. & TECH. L. 87-88 & n.18 (2009); Brief of Various Law & Economics Professors as Amici Curiae in Support of Respondent at 1, *eBay*, 547 U.S. 388 (No. 05-130).

sic property lens, the appropriate relief for trespass is thus an injunction barring the use of the property at issue.”<sup>4</sup> In this Article, this answer will be called the “right to exclude view.”

The other possible answer holds that there is little or no relation between the property and the remedy in IP. In this view, every remedy determination should be made on its own merits independent from considerations common to other similar recurring disputes. Here, this view will be called the “little or no relation view.” This view is expressed in the Court opinion in *eBay*: “the creation of a right is distinct from the provision of remedies for violations of that right.”<sup>5</sup> The little or no relation view encourages decision makers to reason about remedies by applying traditional principles of equity on a case-specific basis.<sup>6</sup>

The relation between the property and these remedial issues needs to be explored more than it has been to date in IP scholarship. In private law scholarship, the relations between property rights and their remedies have been explored in scholarship using conceptual philosophy. Although conceptual analysis has been applied elsewhere into IP,<sup>7</sup> I am not aware that it has yet been so applied in relation to the issues in *eBay*.<sup>8</sup> Thus, this Article constitutes an exercise in interdisciplinary cross-pollination. It applies conceptual methods used to study remedies in private law to shed light on the interplay between property and remedies in IP. Of course, conceptual philosophy isn’t monolithic. As Monet provided many perspectives on the Rouen Cathedral, so different approaches to conceptual philosophy may generate different perspectives on the property and the remedies in IP.<sup>9</sup> Here, I apply one vein of conceptual scholarship that I find especially insightful in studies of remedies; readers must judge for themselves whether it sheds helpful light on remedial issues in IP.

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<sup>4</sup> Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 783 (2007) (footnote omitted).

<sup>5</sup> *eBay*, 547 U.S. at 392.

<sup>6</sup> *Id.*; see also Brief Amici Curiae of 52 Intellectual Property Professors in Support of Petitioners at 1, *eBay*, 547 U.S. 388 (No. 05-130).

<sup>7</sup> See, e.g., Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1665-67 (2012); Eric R. Claeys, *Private Law Theory and Corrective Justice in Trade Secrecy*, 4 J. TORT L., no. 2, 2011, at 1-3; Jules L. Coleman, *Intellectual Property and Corrective Justice*, 78 VA. L. REV. 283, 285 (1992); Abraham Drassinower, *Copyright Is Not About Copying*, 125 HARV. L. REV. 108, 109 (2012); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 164-66 (1992).

<sup>8</sup> I addressed these issues in the course of *On Cowbells in Rock Anthems (and Property in IP): A Review of Justifying Intellectual Property*, 49 SAN DIEGO L. REV. 1033, 1058-63 (2012) (book review). Since my primary goal in that essay was to review a book (by Robert Merges), the conceptual relations I treat here were somewhat assumed there.

<sup>9</sup> With appropriate attribution, of course, to Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1127-28 (1972).

According to that scholarship, both the right to exclude view and the little or no relation view are problematic. Both views are accurate in limited contexts. Yet each view is inaccurate and possibly even misleading outside the right contexts, and it isn't hard to imagine how each might be misused outside its proper context.

Both views are problematic and potentially misleading because they portray what are open-texture relationships as monotonic relationships. Remedial principles have a symbiotic relationship with the legal rules and norms that generate substantive rights—whether those rights sound in property, bodily integrity, reputation, or so on. Similarly, property law and policy influence many related fields—not only remedies but also contract and tort—without determining their contents. Of course, in IP (in particular, in patent and copyright), remedy determinations are governed not by general principles of property common law or related equities but instead by federal statutes. Operationally, however, the relevant statutes direct courts back to the same general relations. The Copyright Act does so by authorizing a court to enter an injunction “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”<sup>10</sup> The Patent Act not only repeats that “reasonability” limitation but also authorizes the grant of injunctions “in accordance with the principles of equity.”<sup>11</sup>

As a result, in IP, remedial decisions are neither totally free from nor totally determined by property rules and policies. Instead, the former are influenced by the latter as much as specific decisions are by the general directives of an open-texture system. Oversimplifying a little, property law and policy channel inquiry at three levels of generality. The first inquiry asks whether a given class of resources counts as property at all. If the resources deserve to count as property, the second inquiry asks which of several property-related strategies should be applied to them, and the third asks how the strategy chosen at the second stage should be modified to the facts of a given dispute involving the resource.

The legal issues raised in *eBay* present one cluster of second- and third-level issues. Property rights protect freedom along three dimensions: the rights to control, use, and dispose of the resource in the class declared to be property. Different related fields of law focus on different dimensions. For example, tort law addresses issues related to control and use rights—for land, in trespass and nuisance, and for IP, in infringement. Remedy determinations provide the first and simplest forum in doctrine where courts can work out the scope and limits of proprietary rights of disposition.

When courts hand down remedy precedents awarding or refusing injunctions in IP disputes, they clarify when IP holders have rights to dispose of their IP. In other words, that case law clarifies when holders may insist that non-holders obtain their consent in advance before transacting with

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<sup>10</sup> 17 U.S.C. § 502(a) (2012).

<sup>11</sup> 35 U.S.C. § 283 (2012).

their IP, and when they must accept the possibility that non-holders may transact with their IP without prior consent. Although such case law sounds in remedy law, it is property-related. Lines of remedy precedent indirectly specify the metes and bounds of IP holders' rights to dispose. And substantively, this case law is partially determined by property norms. Although the norms sound in property law and not remedy law, they are relevant to and inform the general considerations suggesting when equity is appropriate.

That relation creates an open-texture system. Patent and copyright both institute variations on one property strategy, to give parties designated owners broad control over a resource to manage and determine its future uses. That strategy generates a (second-level) presumption for remedies disputes: if an IP holder is suffering an ongoing infringement, the court is more likely to protect the holder's rights of disposition if it enters a preventive injunction than if it limits the IP holder to monetary remedies. But this presumption is rebuttable, and undue hardship and other equitable considerations provide (third-level) safety valves where officials may determine whether the presumptive rule or an exception applies. On the surface, in these and other determinations, courts apply principles and precedents sounding in the fields of equity and remedies. Beneath the surface, the relevant remedies' precedents and principles take direction from policy norms central to the law of property.

If this portrait is right, many impressions of *eBay* and the issues it raises reflect a false dichotomy. The right to exclude view accurately captures the fact that injunctions do implement property policies. Taken out of context, however, this view may be understood to suggest that property doesn't justify presumptively but rather mandates the entry of an injunction. When "property," "exclusion," and similar concepts are portrayed in this extreme light, the portraits inadvertently make the little or no relation view seem necessary or inevitable. Conversely, the little or no relation view accurately captures the fact that the presumptive relation between property rights and injunctive relief is rebuttable. Taken out of *its* context, however, this view encourages decision makers to decide each remedy dispute in its own specific context, separate from policy goals associated with the institution "property." There is a reasonable middle ground: the concept "property" and the institutional structure of the private law set up an open-texture, indirect-consequentialist system to administer the policy issues associated with property rights and remedies.

I. *EBAY*A. *On the Relation Between Property Rights and Equitable Relief*

*eBay* raises, on relatively straightforward facts and law, a fundamental normative choice: if a party who does not own IP claims a need to use a proprietor's IP, when is it preferable to insist that the party persuade the IP holder to transact with her, on conditions the holder finds satisfactory? And when is it preferable to permit the party to force a transaction, by using the IP without the holder's prior consent and then paying compensation set in an official proceeding?

This choice lurks behind many IP doctrines. Every compulsory license provision in copyright implements the latter option.<sup>12</sup> Throughout private law, though, this policy choice is raised most generally by principles of equity determining when the victim of an ongoing tort is entitled to protective, injunctive relief. Patent and copyright statutes incorporate these principles by reference when they instruct courts to determine whether equitable relief is appropriate (in patent) "in accordance with the principles of equity"<sup>13</sup> or (in copyright) "on such terms as [a court] may deem reasonable."<sup>14</sup>

*eBay* purported to explain how these general principles of equity to patent infringement disputes, but it assumed that the principles apply interchangeably in copyright and patent.<sup>15</sup> When I used the term "purported" in the last sentence, I did so because I agree with others<sup>16</sup> who have argued that the Court actually misstated the equity background it claimed to be "well-established."<sup>17</sup> To avoid complications, though, in this Article, I take

<sup>12</sup> See, e.g., 17 U.S.C. §§ 111(d)(1), 114(f).

<sup>13</sup> 35 U.S.C. § 283.

<sup>14</sup> 17 U.S.C. § 502(a).

<sup>15</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).

<sup>16</sup> Although there are many problems, I find four particularly powerful. First, *eBay* suggests that applicants for equitable relief must satisfy four necessary threshold requirements; these so-called "requirements" are better described as particularly important discretionary considerations. Next, two of the four *eBay* factors are repetitive: the irreparability of the applicant's harm, and the adequacy of legal remedies to repair the applicant's harm. Furthermore, one factor traditionally important in equity is absent from *eBay*: the strength of the plaintiff's success on the merits. Last, as framed by the Court, the four-factor test makes it seem illegitimate for any field of substantive law to generate rules of thumb where equitable relief is presumptively but rebuttably appropriate. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 339-41 (4th ed. 2010); Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 219 (2012). For other works suggesting that *eBay* destabilized equity, see Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L., no. 3, 2012, at 30-31; Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 75-77 (2007).

<sup>17</sup> *eBay*, 547 U.S. at 391.

the factors discussed by the Court as given and use them as focal points for discussion. As the Court restated the relevant factors,

A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>18</sup>

B. *The Little or No Relation View in the District Court*

These factors *can* be interpreted to express judgments about property rights and other substantive rights, but they needn't be. The little or no relation view denies that there is some connection between the *eBay* factors and substantive IP rights.

Judges don't need to embrace the little or no relation view openly to give it decisive effect. One can see as much in Judge Friedman's initial ruling on MercExchange's application for a permanent injunction. To begin with, Friedman restated the relevant principles of equity in a manner that made his ruling seem primarily a matter of judicial discretion—not constrained by relevant substantive law. Friedman did take cognizance of Federal Circuit precedents considering “the grant of injunctive relief . . . the norm” in patent-infringement cases.<sup>19</sup> Yet Friedman quickly added that “the decision to grant or deny injunctive relief remains within the discretion of the trial judge.”<sup>20</sup>

Judge Friedman also kept the property separate from the remedy by assigning to MercExchange the burden of proving an entitlement to an equitable remedy. Friedman found decisive “evidence of [MercExchange's] willingness to license its patents” and “its lack of commercial activity in practicing the patents.”<sup>21</sup> This evidence was relevant in two respects: it eliminated the presumptive force of the Federal Circuit's so-called general rule, and it then justified Friedman's decision not to enter an injunction. The quote above comes from Friedman's treatment of the irreparable-harm element.<sup>22</sup> Friedman used the same findings and two-step legal argument to conclude that MercExchange had an adequate remedy at law<sup>23</sup> and that

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<sup>18</sup> *Id.*

<sup>19</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 275 F.Supp.2d 695, 711 (E.D. Va. 2003), *rev'd in part*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 712.

<sup>22</sup> *Id.* 711-12.

<sup>23</sup> *See id.* at 713 (“[T]he plaintiff has licensed its patents to others in the past and has indicated its willingness to license the patents to the defendants in this case. . . . While . . . many cases state that monetary damages are typically inadequate . . . this is certainly an atypical case.”).

eBay stood to suffer more hardships from being enjoined than MercExchange stood to suffer from being limited to damages.<sup>24</sup>

### C. *The Right to Exclude View*

The right to exclude view holds that there is a strong relation between the property in patents and the remedies available for infringement. Two different iterations of this view emerged in *eBay*.

The Federal Circuit took one approach: the property in a patent triggers an extremely strong presumption for enjoining ongoing infringement. The Federal Circuit reflected this approach while reversing Judge Friedman's opinion. By statute, a patent confers a "right to exclude others from making, using, offering for sale, or selling the invention" under patent.<sup>25</sup> "Because th[at] 'right to exclude . . . is but the essence of the concept of property,'" the Federal Circuit reasoned, "the general rule is that a permanent injunction will issue once infringement and validity have been adjudged."<sup>26</sup>

The Federal Circuit used this general syllogism and general rule to refute Judge Friedman's analysis. Judge Friedman believed that MercExchange hadn't adequately proven that it suffered some harm making injunctive relief appropriate. Because the Federal Circuit assumed that the opportunity to license IP falls within IP holders' right to exclude, "[t]he fact that MercExchange may have expressed willingness to license its patents should not . . . deprive it of the right to an injunction to which it would otherwise be entitled. Injunctions are not reserved for patentees who intend to practice their patents, as opposed to those who choose to license."<sup>27</sup>

When the Federal Circuit applied the right to exclude view in *eBay*, it did not connect its view to traditional principles of equity. (That omission contributed significantly to the Supreme Court's reversing the Federal Circuit's opinion.) But the right to exclude view could be connected to those traditional principles. This is the approach Chief Justice Roberts suggested, writing on behalf of himself and Justices Scalia and Ginsburg in a concurrence to the Court's unanimous opinion.<sup>28</sup> Like the Federal Circuit, Roberts believes that injunctive relief is particularly appropriate upon a finding of patent infringement. Roberts grounds this view primarily in his reading of the relevant precedents; "[f]rom at least the early 19th century," he observes approvingly, "courts have granted injunctive relief upon a finding of in-

<sup>24</sup> *See id.* at 714.

<sup>25</sup> 35 U.S.C. § 154(a)(1) (2012).

<sup>26</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005) (quoting *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246-47 (Fed. Cir. 1989)), *vacated*, 547 U.S. 388 (2006).

<sup>27</sup> *Id.* at 1339.

<sup>28</sup> *eBay*, 547 U.S. at 394-95 (Roberts, C.J., concurring).

fringement in the vast majority of patent cases.”<sup>29</sup> Yet the precedents seem coherent to Roberts because they address an issue at the intersection of property and remedies law. Roberts justifies the preference for injunctive relief in relation to the “difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee’s wishes.”<sup>30</sup> The right to exclude entitles the patent-holder only to “monetary remedies,” and these remedies are inadequate because they don’t prevent an infringer from “*us[ing]* an invention against the patentee’s wishes.”<sup>31</sup> At a minimum, that discrepancy “often implicates the first two factors of the traditional four-factor test,” for irreparable harm and/or the adequacy of legal remedies.<sup>32</sup>

While Roberts clarified the connection between substantive property rights and remedial principles, he raised another problem. Note how Roberts distinguished between a legal right to exclude and the “use” of the invention. For the Federal Circuit, the “right to exclude” refers to the combination of concept and substance that justifies injunctive relief. For Roberts, by contrast, the right to exclude is the problem that injunctive relief is meant to solve. So if property doesn’t refer to a right to exclude, what conceptual or substantive content associated with property informs equity as Roberts suggests?

#### D. *The Little or No Relation View (Again)*

Notwithstanding Roberts’s concurrence, the little or no relation view proved more influential in the Supreme Court. Justice Kennedy (writing on behalf of himself and Justices Stevens, Souter, and Breyer) embraced the little or no relation view. Kennedy doesn’t believe that the substantive content of an IP right imposes meaningful constraints on the remedies appropriate for infringement of the right: in his view, “[b]oth the terms of the Patent Act and the traditional view of injunctive relief accept that the existence of a right to exclude does not dictate the remedy for a violation of that right.”<sup>33</sup> Nor does Kennedy think that past practice in remedies disputes constrains the content of remedies in current cases; contrary to Roberts, Kennedy read past practice as requiring an injunction only “when the circumstances of a case bear substantial parallels to litigation the courts have confronted before.”<sup>34</sup> Kennedy interpreted the discretion he sees in remedy principles to authorize courts *not* to enter injunctions in three situations.

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<sup>29</sup> *Id.* at 395.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 396 (Kennedy, J., concurring).

<sup>34</sup> *eBay*, 547 US. at 396 (Kennedy, J., concurring)

One is when the patent is a business-method patent; another is when the patent holder isn't "producing and selling goods but, instead, . . . obtaining licensing fees"; and the last is when the infringer faces undue hardship because "the patented invention is but a small component of the product . . . and the threat of an injunction is employed simply for undue leverage."<sup>35</sup>

The Court's opinion comes down somewhere between these two views, though probably closer to the little or no relation view. Writing for the Court, Justice Thomas purported to "take no position on whether permanent injunctive relief should or should not issue . . . in any number of . . . disputes arising under the Patent Act."<sup>36</sup> Here, Thomas and the Court seemed to avoid taking any view about the relations between IP and remedies. Yet Thomas also criticized Judge Friedman's injunction order and the Federal Circuit opinion alike, for applying presumptions (respectively) against and for injunctive relief when "traditional equitable principles do not permit . . . broad classifications."<sup>37</sup> That passage lends credence to the little or no relation view.

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These various opinions all raise the conceptual questions with which this Article began. Doctrinally, it's possible that the Supreme Court's opinion disturbed preexisting principles of equity. At least superficially, the Federal Circuit's approach accords with the 1908 decision *Continental Paper Bag Co. v. Eastern Paper Bag Co.*,<sup>38</sup> in which the Supreme Court reasoned that "patents are property, and entitled to the same rights and sanctions as other property," "that the right can only retain its attribute of exclusiveness by a prevention of its violation," and that "[a]nything but prevention takes away the privilege which the law confers upon the patentee."<sup>39</sup> By calling *Continental Paper Bag* into significant doubt,<sup>40</sup> the main Court opinion in *eBay* raises questions about whether *Continental Paper Bag* was rightly decided and reasoned. If the opinion for the Court was meant to avoid making any definitive pronouncement about that issue, the opinion only postpones the settlement of precedential and policy issues that will eventually resurface.

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 394 (majority opinion).

<sup>37</sup> *Id.* at 393.

<sup>38</sup> 210 U.S. 405 (1908).

<sup>39</sup> *Id.* at 425, 430.

<sup>40</sup> Andrew Beckerman-Rodau reads *eBay* as having overruled *Continental Paper Bag*. Beckerman-Rodau, *supra* note 2, at 631. I doubt as much, because in *eBay* the Court cited *Continental Paper Bag* as authority to repudiate Judge Friedman's opinion. But Beckerman-Rodau is correct to this extent: at a minimum, *eBay* impliedly recasts *Continental Paper Bag* to stand for a weaker proposition than that for which the latter case has been understood to stand.

And these doctrinal and policy issues seem likely to resurface. The Federal Circuit disagreed with Judge Friedman about whether the property in IP shapes IP remedies. In the Supreme Court, Chief Justice Roberts, Justice Kennedy, and Justice Thomas all reargued the same question, and Thomas's Court opinion doesn't resolve that question.

In this Article, I hope to shed light on the relations connecting property, the equitable factors used in *eBay*, and remedies in infringement disputes. The Article focuses particularly on the first three *eBay* factors: (1) irreparable harm, (2) the adequacy of legal remedies, and (3) the balance of hardships.<sup>41</sup> Those three elements provide vehicles through which remedy doctrine can incorporate policies closely associated with the substance of a particular class of disputes. These same policies can also be expressed through the public-interest factor. In IP litigation, for example, it may be argued that the public has an interest in making sure IP is justly protected, or in making sure that IP holders not be allowed to restrain trade or other legitimate activity when not necessary to protect their IP.<sup>42</sup> But those arguments merely duplicate arguments that can already be made with the first three elements. The distinct function of the public-interest factor is to give courts a vehicle for considering publicly important repercussions of a particular dispute when such repercussions distinguish the dispute from run-of-the-mill disputes in the same category.

## II. CONCEPTUAL ANALYSIS IN IP SCHOLARSHIP

### A. *Conceptual Analysis*

To study the interplay between property, the first three *eBay* factors, and remedy legal principles, one may consult a wide range of methodologies. This Article relies on conceptual philosophy applicable to social concepts. Although this approach is not familiar in all quarters, the basic motivation behind the approach is fairly straightforward.

Assume that a group of people have an association, and that the associates agree or assume that it's a good thing for associates to be friends.<sup>43</sup> They may not need to agree on all the reasons why friendship is valuable, and they shouldn't need to work out in advance which close associations count as friendships and which don't. But the term "friend" provides a marker for the social phenomenon that the associates agree to respect and facilitate. It provides a common term in vocabulary. It helps classify associ-

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<sup>41</sup> *eBay*, 547 U.S. at 391.

<sup>42</sup> See 7 CHISUM, *supra* note 2, § 20.04[2](c)(vii).

<sup>43</sup> The example comes from JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 10-11 (2d ed. 2011). Finnis borrows the example from ARISTOTLE, NICOMACHEAN ETHICS, bk. VIII, ch. 4, at 147-48 (Roger Crisp ed. and trans., Cambridge Univ. Press 2004) (B.C.E. 384).

ations as easy cases (best friends) or marginal cases (fair-weather friends). And, even if the term doesn't lock in any one normative justification for friendship, "friend" still assumes and hardwires into common language basic overlapping justifications for friendship. Those basic justifications help focus social disagreement, by giving associates general and shared normative goals to which they can all appeal to express specific disagreement. (Are the ways in which fair-weather friends *are* friends more significant than the ways in which they're *not*?)

Some readers may ask whether conceptual philosophy as presented here is positive or normative. Different conceptual scholars answer this question differently. All agree that conceptual philosophy has a positive dimension. When studying the term "friend," the conceptualist must study it with methods quite similar to the method in which a translator tries to pin down the meaning of a word in a foreign language, or in which a textualist tries to ascertain the meaning of a difficult word in a legal text.

After that, conceptual methods differ sharply. Some conceptualists prioritize normative justification over conceptual analysis. They start with a preferred normative justification, derive from that justification concepts likely to implement its prescriptions, and critique practice in light of the concepts derived. On this basis, Ernest Weinrib derives principles of corrective justice from a Kantian framework.<sup>44</sup> Others prefer an interpretive approach. These conceptualists try to ascertain the working concepts and the underlying normative justifications grounding concepts. Once they have done so, they assume that practice in the field being studied owes some obligation to fit the concepts and structure discovered. These conceptualists follow Ronald Dworkin's interpretive method and his criteria of fit and value.<sup>45</sup> Still other conceptualists hold that conceptual analysis can stay primarily positive; they assume that conceptual analysis can focus on semantic meaning without getting intertwined with questions of justification.<sup>46</sup> And other conceptualists believe that conceptual analysis is logically prior to descriptive *or* normative analysis; one can't offer positive or normative theories about legal matters without first "offer[ing] definitions or ... delimit[ing] categories" for law and legal terms.<sup>47</sup>

Most of what follows after this Part (I hope) does not hinge on a choice between these approaches. In the interest of full disclosure, however, let me set forth my methodological preferences here. Ultimately, I believe,

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<sup>44</sup> See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 84-87, 114-15 (1995); cf. JULES L. COLEMAN, *RISKS AND WRONGS* 433 (1992).

<sup>45</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 919-20 (2010); cf. COLEMAN, *supra* note 44, at 433. On "interpretive" method, see RONALD DWORKIN, *LAW'S EMPIRE* 87-94 (1986).

<sup>46</sup> See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 6-9 (2001) (drawing from sources such as Willard Van Orman Quine); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457, 457-59 (2000).

<sup>47</sup> BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 14 (5th ed. 2009).

it is impossible to disentangle conceptual analysis of social concepts from normative justification and critique of such concepts.<sup>48</sup> That said, I also believe that a conceptual philosopher can generate many useful positive insights before the day of “ultimate” reckoning arrives. Even though legal concepts incorporate normative language, that doesn’t make them significantly different from other forms of knowledge that other scholars can study both positively and normatively. (Think of sociologists studying customs and taboos, or intellectual historians conducting political history.) Before a scholar can critique a given law, concept, or institutional structure normatively, the scholar must be able to ascertain what it is and the arguments most likely to justify or undermine it in practice.<sup>49</sup>

Most of this Article will be argued in this spirit. Every Part except the last will clarify the meanings and the normative context associated with terms like “right,” “property,” “infringement,” “irreparable harm,” and “appropriate remedy.” All of these terms assume normative goals and constraints, but the concepts and their interactions can still be studied positively. Thus, in every Part except the last, this Article portrays (in positive terms) how the structure in which remedies disputes are litigated and settled allows normative policies to filter into doctrine.

In the last Part, this Article covers normative implications. Those implications are only contingently normative. The private law remedies system may be normatively desirable. To subscribe to that view, one must agree with the normative justifications for the substantive rights it protects, and also the normative justifications for protecting those rights indirectly through a wrong-based legal system. This Article sketches and assumes such justifications without defending them at great length. Alternatively, whether or not the private law remedies system is normatively desirable as a first-best matter, if one embraces all of the considerations ordinarily associated with *stare decisis* the remedies system might be desirable as a second-best matter. Last, this Article partially rehabilitates remedies proceedings in a negative way, by showing that a few prominent normative criticisms of such proceedings rest on mistaken conceptual starting assumptions. None of these normative justifications are comprehensive, though, and this Article doesn’t claim that they are.

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<sup>48</sup> The deepest problem is this: when a social scientist tries to impose order on a social phenomenon, any generalization he makes is bound to misclassify some data. (Think of the judge trying to reconcile conflicting precedents.) Judgments about the generalizations that “best fit” the data cannot escape making normative judgments about the overarching goal of the social phenomenon under study. See, e.g., FINNIS, *supra* note 43, at 16-19; Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757, 1765-73 (2002) (book review); Stephen R. Perry, *Hart’s Methodological Positivism*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO “THE CONCEPT OF LAW” 311, 312-13 (Jules L. Coleman ed., 2001). I doubt that this problem is an issue for the phenomena being described in this Article.

<sup>49</sup> In fairness, in legal philosophical scholarship, these ideals are sometimes honored in the breach and not in the observance. See BIX, *supra* note 47, at 10-11.

B. *Is Private Law Conceptual Theory Irrelevant to IP?*

The last paragraph just suggested that some prominent criticisms of remedy law portray inaccurately the relationship between substantive policymaking and legal remedies. Here is one such example: while “[p]rivate law—such as tort, property, and contract law—generally provides remedies for the infliction of wrongs on private individuals and entities,” “[p]atent law . . . is not designed to remedy private wrongs. Rather, its major aim is to promote innovation.”<sup>50</sup>

This criticism, which this Article will call the “purging criticism,” doesn’t refute the private law approach to remedy disputes; instead, it shows the scholarly value of a clearer conceptual understanding of remedy disputes. The purging criticism turns on two important assumptions: first, that each field of private law has one “major” aim; and second, that patent law has an aim fundamentally different from the aim of traditional private law. But consider the first assumption again. Why can’t a field of law have two or more concurrent aims? Tort certainly seems to. On the surface, it’s focused on protecting rights to personal autonomy and property; beneath the surface, these rights are structured as they are for substantive policy reasons.<sup>51</sup> For land, then, trespass, nuisance, negligence, and other fields of tort can work in concert to secure to land owners fairly broad control. That broad control incentivizes people to improve land, invest in it, make commercial use of it, and so on. But tort law never promotes these policy goals directly; by securing rights against trespassory wrongs, it encourages them indirectly.

If traditional private law can manage these dual aims, then the second assumption seems unwarranted as well. The second assumption is certainly right to this extent: patent and other fields of IP have recurring policy goals—say, promoting innovation, facilitating prospecting, and creating the conditions for active commercialization. But the assumption doesn’t consider the possibility that infringement and related remedies pursue that possibility indirectly. By encouraging owners to innovate and disseminate their works, well-developed systems of patent rights, torts, and remedies may encourage more innovation and dissemination than other institutional arrangements could do.

The purging criticism illustrates in a very concrete way how conceptual analysis and normative argument interact. It is sometimes assumed that a scholarly theory or method doesn’t make a meaningful contribution unless it can supply a determinate normative prescription about a specific prob-

<sup>50</sup> Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*, 92 TEX. L. REV. 517, 518-19 (2014).

<sup>51</sup> See Eric R. Claeys, *On the “Property” and “Tort” in Trespass*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 122, 123-24 (John Oberdiek ed., 2014) [hereinafter Claeys, *On the “Property” and “Tort” in Trespass*].

lem—say, the question Justice Kennedy raised about whether the use of IP to license is as desirable as the use of IP to produce goods directly for sale. The analysis presented here has implications for that question, but those implications aren't the only or the main implication of the analysis. More often, conceptual analysis has shallow but wide normative implications. It doesn't require any single policy result; instead, it tends to suggest that one category of possible results is misguided because the results are all informed by dubious conceptual priors. The purging criticism starts with two conceptual priors—non-IP private law is formalistic, while patent law is policy-driven. However inadvertently, the conceptual framing slants the normative argument that follows; the framing makes non-IP private law seem undesirable and an instrumentalist approach to IP remedies seem necessary or inevitable. If both of sides of the comparison start from bad conceptual priors, however, none of the normative consequences that seem to follow really do.

C. *Does the “Cathedral” Supersede Private Law Concepts?*

Other readers may wonder: doesn't economic analysis provide a better framework for analyzing the policy issues relevant to remedies than private law concepts do? Since *eBay* raises questions about the scope of IP remedies, the issues it raises may be analyzed<sup>52</sup> with the scheme of property rules and liability rules associated with Calabresi and Melamed's “Cathedral” article and its taxonomy of property rules and liability rules.<sup>53</sup> There are a few different ways to answer this question; the answers depend on how enthusiastic questioners are about the “Cathedral” framework.

If scholars are ecumenical, there is a simple answer: conceptual analysis adds one more perspective on the remedy cathedral, just as Calabresi and Melamed's article did. In particular, conceptual analysis complements “Cathedral”-style economic analysis, because the former focuses on aspects of remedies law that aren't terribly important to the latter. “Cathedral”-style economic analysis tends to focus on policy-specific questions. Conceptual analysis finds it more interesting and important to understand why tort and remedies law institute bilateral structures, why they eschew apparently value-neutral terms like “liability rule,” and why they instead use value-charged terms like “infringement” and “protective injunction.” Conceptual-

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<sup>52</sup> See, e.g., THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* 53-54 (2013); Dan L. Burk, *Intellectual Property in the Cathedral*, in *ACCESS TO INFORMATION & KNOWLEDGE* 95, 102 (Dana Beldiman ed., 2013); Lemley & Weiser, *supra* note 4, at 784-85; Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 *TEX. L. REV.* 1991, 2010 (2007); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 *COLUM. L. REV.* 2655, 2655-56 (1994).

<sup>53</sup> Calabresi & Melamed, *supra* note 9, at 1106-10.

ists are interested in *these* questions because they think the most interesting and important dimensions of law are the following: law coerces people, and law purports to make that coercion seem just because it claims it has legitimate authority to enforce the coercion.<sup>54</sup>

If proponents insist that “Cathedral”-style analysis is the best possible framework, however, they open the door to other responses. Conceptually, it seems likely that the terms “property rule” and (especially) “liability rule” “misdescribe the legal system, and in particular its idea of property.”<sup>55</sup> Separately, “Cathedral”-style analysis raises normative questions more vexing than is often appreciated: which measure of efficiency should be chosen; which parties start with what resource-entitlements; how should the analysis deal with incommensurable values disputants place on using a resource; or, if the analysis avoids incommensurability problems and focuses on wealth-maximization, why wealth has any normative relevance.<sup>56</sup>

I hope an intermediate answer suffices here: even if one views law primarily as an instrument to promote policy goals, one may still find conceptual analysis useful because it facilitates indirect-consequentialist reasoning. Henry Smith justifies the institution of property in economic terms; in his justification, property institutes broad rights of exclusion but provides governance-based exceptions for specialized and high-value resource disputes.<sup>57</sup> This Article describes a similar interplay, in rights-based terms, between broad rights of exclusive control over IP and narrow exceptions when a non-owner has an especially strong interest in using IP. Now, this Article certainly can’t prove that such indirect-consequentialism can or will succeed. Indirect-consequentialist strategies necessarily generate false positives and negatives, and these twin errors raise difficult moral and empirical questions. Before anyone can say whether this strategy will succeed or fail, however, she must understand the strategy. And to understand the strategy, one must understand its concepts and how the concepts relate to policy goals commonly associated with property.

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<sup>54</sup> See Jules L. Coleman, *Some Reflections on Richard Brooks’s “Efficient Performance Hypothesis”*, 116 YALE L.J. POCKET PART 416, 422 (2007), available at <http://yalelawjournal.org/forum/some-reflections-on-richard-brooks-efficient-performance-hypothesis>.

<sup>55</sup> J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 64-67 (1997). See *infra* Part IV.

<sup>56</sup> See, e.g., JOSEPH WILLIAM SINGER, *PROPERTY* 113-20 (4th ed. 2014); Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 222-23 (1980); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 194 (1980).

<sup>57</sup> See Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1748-51 (2007) [hereinafter Smith, *Intellectual Property as Property*]; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004).

### III. THE CONCEPTUAL RELATION BETWEEN SUBSTANTIVE RIGHTS AND TORT WRONGS

As section II.B suggested, the remedies issues raised in *eBay* apply to IP general private law principles about moral rights, legal rights, and legal remedies. This Part recounts the general architecture of tort law. The next Part will show how that architecture applies to remedies disputes similar to the disputes typified by *eBay*. This and the next Part should set the conceptual stage for Part V, which explains how IP infringement injunctive-relief disputes fit into the private law.

#### A. *Rights*

Law and non-legal social ordering both build on some basic pre-legal social concepts—especially “interests” and “rights.” In many contexts, the term “interest” captures an important point about social morality: at least some apparent goods that people are psychologically attracted to pursue are also objective goods that they are normatively justified in pursuing. In this sense, people may have interests, both motivational and normative, in pursuing their self-preservation, maintaining and living in a family, or cultivating their intellects.<sup>58</sup>

Some particularly strong interests generate social and legal rights. As used here, “rights are best understood as ‘conceptual markers,’ or ‘placeholders,’ used to designate a subset of legitimate interests or liberties to be accorded special protection by law.”<sup>59</sup> In this sense, then, rights have two major dimensions. “All rights seem to merge *entitlements to do, have, omit, or be something with claims against others to act or refrain from acting in certain ways.*”<sup>60</sup> In one dimension, the claim-right conferred by a legal right entitles the right holder to exclude others from interfering with a rightful domain of autonomy. This is the “claim against” dimension of a right. In another dimension, however, the domain of autonomy is structured to facilitate the individual’s pursuing the strong normative interest justifying the enjoyment of the right. This is the “entitlement” dimension of a right.

Some readers may assume that, as defined in the last two paragraphs, rights and interests are self-centered and individualistic. They’re not. When members of a society come to agree that a right deserves to be recognized, they do so because recognizing the right redounds to the interests of most or

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<sup>58</sup> See, e.g., 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 33-34 (1987); Joseph Raz, *On the Nature of Rights*, 93 *MIND* 194, 208-10 (1984); accord PENNER, *supra* note 55, at 32-63.

<sup>59</sup> Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *YALE L.J.* 1335, 1342 (1986).

<sup>60</sup> Joel Feinberg, *The Nature and Value of Rights*, 4 *J. VALUE INQUIRY* 243, 256 (1970).

all community members—not just the right-holders. One simple illustration comes in the law of battery. Battery law assumes and protects a right to be free from any unconsented touching except for a touching impliedly authorized by a social context in which the alleged battery victim voluntarily joined.<sup>61</sup> This right of bodily autonomy institutes a broad claim-right excluding every community member from touching others without their consent except in certain specific social contexts. Ordinarily, the claim-right indirectly facilitates people pursuing all the normative interests they can't pursue without having minimal security that they won't be enslaved or gratuitously attacked. In some contexts, however, people fulfill social interests by recreating, playing sports, dancing, going on dates, and so on. The limitations on the claim-right indirectly facilitate the pursuit of those social interests.

### B. *Property*

With this background, “property” refers to a social and legal right of exclusive use around an external resource. The normative interest that justifies property is an interest people have in using resources to improve their lives. Property confers a claim-right, which entitles holders to exclude others from some underlying domain of freedom. The claim-right is designed to facilitate underlying moral entitlements, people's interests in using the resources owned, beneficially for reasonable life goals.<sup>62</sup>

Two aspects of this right of exclusive use stand out. First, in practice, at least for the most familiar forms of property (land, and personal tangible articles) the claim-right recognized in law is far broader than the moral interest justifying it. Trespass and other boundary-driven doctrines give owners broad rights of exclusive control and managerial authority. These rights give different owners similar discretion to pursue different individual life goals—just as a broad right of bodily autonomy gives different people similar freedom to pursue different life goals.

Second, like all other rights, property is a social right. So even broad rights of exclusive control and managerial authority have to be justified in relation to the effects they have on others' use interests. Exclusive rights are justified if it seems practically certain that broad exclusion incentivizes owners to produce valuable resources from property *and share those products with* others. But exclusive rights are also defeasible, when non-owners have narrow and strong interests in using a resource, and those interests may be accommodated without undermining the goods that come from pri-

<sup>61</sup> See *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891).

<sup>62</sup> See Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 23-25 (2011) [hereinafter Claeys, *Exclusion and Exclusivity*]; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 395-97 (2003).

vate ownership. Thus, as rights of bodily autonomy have exceptions for touchings impliedly licensed for social context, property rights have corresponding exceptions. Land-based trespass can institute defenses recognizing non-owners' implied easements to forage or hunt for subsistence, and nuisance has built-in limits permitting owners to emit low-level pollution incidental to ordinary and common uses of land.<sup>63</sup>

Readers may wonder how a right of exclusive use relates to the right to exclude mentioned by the Federal Circuit, Chief Justice Roberts, and scholars who conceive of property as a right to exclude.<sup>64</sup> This is the subject of a specialized scholarship that would create needless distractions to explore here.<sup>65</sup> Here, it suffices to say: some understandings of the right to exclude have little or no relation to a normative interest in use. Consider the veto rights Michael Heller described Moscow regulators having over street kiosks, and a simple usufruct.<sup>66</sup> The veto rights create a right to exclude unlinked to a right of use.<sup>67</sup> The usufruct creates a right to use; if there is exclusion, the exclusion is tailored only as seems likely to protect and facilitate the usufructuary use.<sup>68</sup> In many if not most routine settings, however, exclusion and exclusive-use scholarship generate similar portraits of property and ownership.

### C. *Interferences with Property Rights and Other Rights*

Property rights and other substantive rights generate claims of respect and protection. Ordinarily, however, law doesn't implement these substantive rights directly, and legal systems don't declare and protect property rights by enumerating in advance all the specific uses that follow from those rights. For a variety of reasons, the law promotes values associated with judicial economy if it institutes a "wait and see" approach, and if it defers dispute resolution until some party cares enough about her rights to assert them. On that basis, it makes a great deal of sense for a legal system to declare rights indirectly. By prohibiting battery, assault, false imprisonment, harm to a person when an actor owes a duty to care for the safety of

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<sup>63</sup> See Claeys, *Exclusion and Exclusivity*, *supra* note 62, at 32-34.

<sup>64</sup> PENNER, *supra* note 55, at 49-51, 68-75; cf. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 745-47 (1998); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693-94 (2012).

<sup>65</sup> See Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on Property as the Law of Things*, 125 HARV. L. REV. 133, 133-34 (2012) [hereinafter Claeys, *Exclusion and Private Law Theory*]; Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255, 255-57 (2011).

<sup>66</sup> See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998).

<sup>67</sup> *Id.*

<sup>68</sup> See Claeys, *Exclusion and Exclusivity*, *supra* note 62, at 29-30; Claeys, *Exclusion and Private Law Theory*, *supra* note 65, at 144. *Contra* Merrill, *supra* note 64, at 730-31.

others, and so on, a system of tort indirectly secures people's liberty of bodily autonomy when they deserve it.<sup>69</sup> So too for land: trespass, nuisance, negligent damage to land, ultra-hazardous activity damaging land, and so on in relation to substantive property rights in land.<sup>70</sup>

As a result, the private law—and especially tort law and tort-related remedies principles—have a complex structure. As the purging criticism correctly appreciates, private law does have a bilateral structure. In its operational structure, the private law seems to be organized around corrective justice and wrongs: *B* wronged *A*; *A* seeks confirmation that *B* did in fact wrong *A*; *B*'s wrong triggers in *B* a secondary responsibility to expunge the harms *A* suffers as a result of the wrong; and *A* prays for relief rectifying the wrong.

But this operational structure says nothing (or, at most, very little<sup>71</sup>) about the substantive content of the various rights that might be wronged. *Contra* the purging criticism, the private law promotes policy goals equivalent to the role that innovation plays in patent law. Tort defines different torts differently, indirectly to promote different policy goals. In tort, the prima facie case for trespass to land specifies the possessory interest in land to be quite broad.<sup>72</sup> The substantive rights so specified vindicate several overlapping social judgments: facilitating labor; securing autonomy; respecting the personhood interests that people come to claim in land they transform; encouraging wealth-creating uses of land; and so forth. By contrast, in tort, the prima facie case for unfair competition is extremely narrow. That case also vindicates overlapping social judgments: that people will have more autonomy, greater concurrent opportunities to labor, or greater joint prosperity, if unfair competition is focused primarily on deceptive practices or malicious and destructive acts toward competitors.<sup>73</sup> Neither of these (overdetermined) judgments is a matter of corrective justice.

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<sup>69</sup> Or, in positive terms, when controlling political norms prescribe that they deserve it.

<sup>70</sup> See Claeys, *On the "Property" and "Tort" in Trespass*, *supra* note 51, at 123-24. This point was suggested previously, among other sources, by Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. STUD. 165, 168-69 (1974); Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1222-23 (1979).

<sup>71</sup> There's another, broader understanding of corrective justice, which requires a political morality to recognize for all political associates principles of equal freedom of respect. See, e.g., COLEMAN, *supra* note 44, at 361-62; PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 3 (2014); WEINRIB, *supra* note 44, at 56-57; Martin Stone, *The Significance of Doing and Suffering*, in *PHILOSOPHY AND THE LAW OF TORTS* 131, 131-32 (Gerald J. Postema ed., 2001). That understanding constrains the substance of rights, because it requires that rights confer autonomy, and similar domains of autonomy, to all equally qualified rights-holders. But that understanding doesn't wholly settle the content of rights, and it doesn't affect the broad contrast I draw in text between the substantive content of rights and the remedial structure by which private law protects those rights.

<sup>72</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 158 (1965).

<sup>73</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 1-7 (1995).

As a result, especially in torts and tort-related remedies, the gallery of “wrongs” and other liability-triggering acts can vary quite a bit in their contents and their expressive messages. Some torts are rights-based, others harm-based; some require deliberate *scienter*, others carelessness, and for others any voluntary act can suffice for *scienter* purposes. As relevant here, there are also subtle differences in the normative messages entailed by different interferences with rights. As relevant here, I use the term “interference” in a value-free sense. Some, and probably most, interferences are classified as activities deserving condemnation. These are the interferences that threaten substantive rights significantly and without justification. In other cases, however, interferences aren’t wrong, are only conditionally wrong, or are wrong in some dimensions and permissible in others. Interferences take this character if controlling norms suggest that competing rights or interests permit their holders to engage in conduct threatening the rights of others.

In addition, private law, tort, and remedies internalize many different concepts for different interferences threatening owners’ freedom to transact with their rights. Although these concepts have been studied from a wide range of perspectives in conceptual scholarship,<sup>74</sup> especially helpful here is a taxonomy developed by Jules Coleman and Jody Kraus. Coleman and Kraus focus more than most on the way in which remedial orders partly specify the contents of the substantive rights protected by private law.

Coleman and Kraus sort interferences with rights into three categories. “Category One” is the simplest: the defendant’s interference consists of a wrong to the plaintiff’s rights. In a negligence case in which a reckless driver hits a victim, “the victim’s right not to be injured or harmed entails that others are not free to ‘injure’ or ‘take’ without securing his consent. In this analysis, his right not to be harmed is intended to secure a realm of autonomous control over what happens to him.”<sup>75</sup> In the realm of real-property torts, similar claims are expressed by claims for trespass, nuisance, and negligent damage to property.

Coleman and Kraus present two other categories, for two classes of interferences that don’t count as unqualified wrongs. One class (which I’ll call here “Category Three”) covers situations when *B* wrongs *A*, *B* owes *A* compensation, but *B* has a moral justification for the act that causes the wrong even if *B* can’t and never does compensate *A*. Coleman and Kraus illustrate with *Vincent v. Lake Erie Transp. Co.*,<sup>76</sup> where one party exercises

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<sup>74</sup> See, e.g., Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 2-3 (2000); Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137, 137-38 (2011); Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1727 (2012); Emily Sherwin, What Civil Remedies Do 13 (Oct. 21, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2343144>.

<sup>75</sup> Coleman & Kraus, *supra* note 59, at 1362; see also Coleman, *supra* note 54, at 419-20.

<sup>76</sup> 124 N.W. 221 (Minn. 1910).

a legal privilege to commandeer another party's property during a dangerous emergency, and damages that property in the process.<sup>77</sup> This Article won't dwell on this category further here, because it isn't relevant to the issues raised in cases like *eBay*.

In "Category Two," *B*'s conduct would have been wrong if *B* hadn't paid *A*, but *B* has a social entitlement by which the payment to *A* gives *B* a license or permission to force *A* to suffer his transaction. Coleman and Kraus treat damages in ultrahazardous strict liability as an example in this category.<sup>78</sup> For reasons too complicated to cover here, this example backfires and more properly belongs in their Category One, for simple wrongs.<sup>79</sup> Even so, other legal relations fall in Category Two regardless of whether ultrahazardous liability does. Take property in land again. Substantive property policies justify trespass protections against strangers. Among cotenants, though, those same general policies can justify a regime in which one cotenant has a power to oust the others on the condition that she account to them for her profits. Or, as a matter of property policy, in communities that are extremely arid, it may make more sense to entitle land owners to institute private eminent domain proceedings to acquire ditch easements.<sup>80</sup> In both rules, conduct that would be wrong without payment becomes legitimate with payment.

This taxonomy presents private law judgments about wrongs and rights in a spirit much more faithful to doctrine than "Cathedral"-style analysis usually does. Calabresi and Melamed define a "liability rule" as a legal rule entitling *B* (a non-right-holder) to "destroy [*A*'s] initial entitlement if he is willing to pay an objectively determined value for it"; usually, the "transfer or destruction [of entitlements] is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves."<sup>81</sup> This definition covers all three of Coleman and Kraus's categories. By blurring the boundaries between these three categories, the concept "liability rule" invites substantive confusions. In many different settings, the non-right-holding character *B* deliberately wants to destroy *A*'s rights and expropriate resources that *A* would otherwise control. When legal discourse distinguishes between trespass and the exercise of ouster or private eminent domain, deliberate expropriations and legitimate forced transfers are kept in separate conceptual and doctrinal boxes. When "liability rule" takes over the discourse, it blurs the difference between these two classes of

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<sup>77</sup> See Coleman & Kraus, *supra* note 59, at 1358; Coleman, *supra* note 54, at 420.

<sup>78</sup> See Coleman & Kraus, *supra* note 59, at 1358 & n.27 (citing *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969)).

<sup>79</sup> See Claeys, *Exclusion and Exclusivity*, *supra* note 62, at 40 n.155.

<sup>80</sup> See COLO. CONST. art. II, § 14; *Gillmor v. Gillmor*, 694 P.2d 1037, 1039-40 (Utah 1984); Claeys, *Exclusion and Exclusivity*, *supra* note 62, at 39-40 & n.155.

<sup>81</sup> Calabresi & Melamed, *supra* note 9, at 1092.

disputes, and the blurring works to erase some of the stigma associated with trespasses and other Category One wrongs.<sup>82</sup>

#### IV. THE CONCEPTUAL RELATION BETWEEN PROPERTY RIGHTS AND DISPUTES OVER INJUNCTIVE RELIEF

##### A. *Judgments Ordering or Denying Injunctive Relief*

Since Coleman and Kraus made their “point of departure ... a reinterpretation of the Calabresi-Melamed framework,”<sup>83</sup> they did not explore all the remedies issues related to that framework. Their article helpfully reconstructs and clarifies terms like “property rule” and “liability rule,” and it identifies examples of legal rules in practice matching each of those concepts. Yet their article tends to focus on examples from tort and implications relevant primarily to tort scholarship. In particular, when Coleman and Kraus analyze the concept “liability rule,” they focus on situations in which the wrong to the plaintiff’s rights has already taken place and the only way to rectify the wrong is to order payment of monetary damages.<sup>84</sup> Property and remedies law both raise a wider range of issues. When a wrong is ongoing and may still be enjoined, the dispute raises issues about when a property holder can insist on refusing to transact with someone else—and when someone else may initiate a transaction with the holder against her consent.

These disputes may strain Coleman and Kraus’s categories. Take a standard land-based undue hardship dispute. *B* builds an encroachment on *A*’s land, but the impact on *A*’s land uses is slight and the encroachment would be extremely expensive to remove. When a court finds *B* liable and enjoins *B*, it clearly issues a Category One judgment. It’s not so clear what the court does when it holds *B* liable, refuses to enjoin *B*’s encroachment, and instead allows *B* to pay permanent damages. The finding of liability seems a Category One judgment. By refusing to enter a protective injunction, the court seems to ratify or validate *B*’s conduct—consistent with Category Two. Does a finding of undue hardship validate or ratify the defend-

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<sup>82</sup> See Coleman & Kraus, *supra* note 59, at 1362-64; cf. Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2096-102 (1997). For similar reasons, critics of Cathedral analysis complain that the term “liability rule” can’t capture why a damage judgment for a sexual attack doesn’t give the attacker after-the-fact permission to rape for the monetary award ordered by the court. See Epstein, *supra*, at 2103-04; Calabresi & Melamed, *supra* note 9, at 1125.

<sup>83</sup> Coleman & Kraus, *supra* note 59, at 1340.

<sup>84</sup> See, e.g., *id.* at 1365 (“The simple truth is that liability rules in torts play both roles [of condemning and legitimating forced transfers of rights]. Distinguishing between them in a principled manner is *the* task of tort theory.”).

ant's past encroachment? And does it undermine the plaintiff's property right?

B. *The Expressive Meaning of Judgments Ordering or Denying Injunctive Relief*

The answer to the first question is “no.” Ordinarily, courts don't describe the damage awards they order as conferring on defendants options to trespass if they're willing to pay the requisite damages. Courts don't dwell very often on the expressive messages they convey when they enter judgments withholding injunctive relief and limiting plaintiffs to damages. On the rare occasions when courts do think about the expressive messaging, they insist that their judgments don't provide a “sanction [for] . . . private eminent domain.”<sup>85</sup> In other words, when a court refuses to enter equitable relief, it doesn't convert its judgment of liability from a finding that a wrong took place to a finding that the defendant had a license to transact with the plaintiff's property as long as she paid the plaintiff damages.

When courts *don't* think about these expressive issues, they routinely call the offending structures “encroachments”—i.e., (Category One) trespasses deserving condemnation. Courts will sometimes withhold equitable relief to encroached-on land owners. But when courts do so, they don't say that it's permissible or desirable to give the encroacher judicial approval to encroach. Rather, they withhold injunctive relief because it threatens to “act oppressively” or make the court “a party to extortion.”<sup>86</sup> The expressive message is: the defendant committed a wrong, but for case-specific reasons, an injunction would do more than rectify the wrong and instead empower the plaintiff to interfere with legitimate interests the defendant holds.<sup>87</sup> In encroachment cases, the legitimate interest is the structure and the effort associated with the structure, both of which the encroacher put on the owner's land by a mistaken but excusable trespass.

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<sup>85</sup> *Goulding v. Cook*, 661 N.E.2d 1322, 1324 (Mass. 1996) (quoting *Goulding v. Cook*, 645 N.E.2d 54, 58 (Mass. App. 1995) (Armstrong, J., dissenting) (internal quotation marks omitted), *vacated*, 661 N.E.2d 1322 (Mass. 1996)).

<sup>86</sup> *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) (en banc).

<sup>87</sup> This relation comes out even more clearly in nuisance disputes. In nuisance, courts describe the offending pollution as a nuisance, but explain that an injunction “would be practically a confiscation of the property of the defendants for the benefit of the complainants” and warn that “in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can.” *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 667 (Tenn. 1904).

C. *The Substantive Content of Judgments Ordering or Denying Injunctive Relief*

For these expressive messages to hang together, the law needs a coherent account of the property rights in play. That need takes us to the second issue: whether an order withholding injunctive relief and ordering damages abrogates and undermines a property right. The answer seems to be “yes”—*if* (as Lemley and Weiser assume) the right to exclude is “the essence of a true property right,” and a property-centric focus makes “the appropriate relief for trespass . . . an injunction barring the use of the property at issue.”<sup>88</sup>

Yet this answer makes property seem extreme; property seems to make claims for protection that have no built-in limits. This portrait isn’t consistent with the concept of property set forth in Part III.B above. When property consists of a right of exclusive use, owners’ exclusionary rights are judged by how well they facilitate use interests—not only for themselves but also for non-owners.

This answer also isn’t consistent with how property interacts with other fields of private law. From that perspective, “property” consists of an open-texture network. “Property law” contains specific doctrines—e.g., land comes with a possessory interest in control specified by a right to exclude others. It also contains mid-level policies, of the type to which a capable appellate lawyer would appeal to distinguish but still reconcile an inconvenient precedent. (Don’t enforce trespassory boundaries when non-owners have legitimate interests in crossing land to gather sustenance for food, or in search of water.) Those mid-level property policies get applied in related fields of law—tort (the *prima facie* tort of trespass and its defenses) and remedies.

From that perspective, an order withholding injunctive relief doesn’t violate property rights; it limits equitable relief when the substantive property rights at issue don’t warrant such relief. Judicial holdings in remedies disputes have two functions. From a remedies-based perspective, particular decisions rectify wrongs to trespassed-on owners’ rights. From a property-based perspective, though, remedies can’t rectify wrongs without an account when rights holders have legitimate rights. Indirectly, then, remedial precedents implement property-related policies. Even though property consists of an overarching right of exclusive use, that right may be broken down and studied along three dimensions—use, control, and disposition. Ordinarily, an injunction against trespass protects property in all three dimensions. In particular, the injunction protects freedom of disposition. An owner can’t enjoy control or use of an asset without security that she can transact with it only with parties and on terms she prefers. In a genuine un-

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<sup>88</sup> Lemley & Weiser, *supra* note 4, at 783.

due hardship case, however, no meaningful purpose is served by ordering the removal of the encroachment. The owner deserves a presumptive right to the exclusive disposition of the land, but the dispute arises on facts where the presumption doesn't apply.

D. *How Equitable Considerations Implement Substantive Property Goals*

Since remedies disputes have this two-edged character, traditional principles of equity do as well. Considerations like irreparable harm, adequacy of legal remedies, and hardship connect remedies judgments to property policies. These principles serve two functions. In easy cases, the concepts implement the basic presumption that an exclusive right to property entails exclusive discretion to determine the disposition of the property. When a dispute threatens rights at the core of an owner's exclusive disposition, judges can express that connection by stating that money damages won't be adequate or will leave the owner with irreparable harm. This is exactly the connection to which Chief Justice Roberts appealed when he argued that monetary remedies may "allow an infringer to *use* [a resource covered by property] against the [owner's] wishes—a difficulty that often implicates the first two factors of the traditional four-factor test."<sup>89</sup>

In other easy cases, the traditional factors of equity provide a vocabulary in which to express a judgment that an owner's presumptive right of exclusive disposition doesn't apply on the facts. Thus, the encroached-on landowner doesn't suffer irreparable harm, lack adequate remedies, or face undue hardship if her substantive interest in using the encroached-on land is trivial. Or, because the encroaching structure is substantial and installed accidentally, the encroacher has a legitimate and large interest in his investments—doctrinally, a strong claim of undue hardship.

In hard cases, different legal actors may disagree as to which justifications for property are most persuasive, or how any justification or justifications apply to particular facts. In such cases, the terms "inadequate remedy," "irreparable harm," and "balance of hardships" supply a common vocabulary where these and other disagreements may be joined and focused.<sup>90</sup>

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<sup>89</sup> eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring).

<sup>90</sup> See, e.g., *id.* at 391-92 (majority opinion).

## V. THE CONCEPTUAL RELATION BETWEEN RIGHTS AND REQUESTS FOR INJUNCTIVE RELIEF IN IP

### A. *IP*

The same conceptual relations and claims discussed in the previous two parts apply to the class of infringement disputes addressed in *eBay*. To begin, patents and copyrights both constitute property as portrayed in section III.B. Patents are explicitly declared to “have the attributes of personal property.”<sup>91</sup> This property comes in the form of a right of exclusive use—a domain of exclusive discretion to manage the making, use, selling, or offering for sale of an invention under patent.<sup>92</sup> The property in a copyright focuses not on the creation or general use of the copyrighted work, but rather on specific activities that may be conducted on fixed versions of the work—like copying, display, or performance. Even so, by protecting a copyright holder’s exclusive authority over copying, displaying, and performing, copyright defines a list of activities in which holders may engage, it protects them with exclusive rights, and these rights are justified by their tendency to facilitate the creation and wider use of the protected works. That structure constitutes a right of exclusive use grounded in people’s concurrent interests in use.<sup>93</sup>

Readers may protest that property paradigms shouldn’t apply to intellectual works. The paradigm example of “property” is land, the objection goes, and intellectual resources are different because they are non-rivalrous and -excludable.<sup>94</sup> This objection has both conceptual and normative dimensions, and this Article can’t deal with the normative dimensions. Suffice it to say here that the conceptual premises of the objection are debatable, and the more untenable those premises are the less persuasive seem the normative parts of the objection.

The objection assumes (first) that conceptual analysis defines a concept in terms of an ideal type or paradigm case, and (second) that the “property” concept’s paradigm is land. Some concepts of property could embody both assumptions; the one proffered in the last part and in this section does not. If property refers to a right of exclusive use, “proprietary” relations occur not only in trespass to land but also in usufructuary systems, common carrier systems, and other variations. Similarly, property can be

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<sup>91</sup> See 35 U.S.C. § 261 (2012).

<sup>92</sup> See 35 U.S.C. §§ 154(a), 271(a); Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321, 322 (2009); cf. Smith, *Intellectual Property as Property*, *supra* note 57, at 1745-46.

<sup>93</sup> See 17 U.S.C. § 106 (2012); Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 251-53 (2011).

<sup>94</sup> See, e.g., Julie E. Cohen, Post-Industrial Property 2-3 (Aug. 8, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2478051>.

indefinite or limited in duration. For examples of the latter, think of the property bridge builders used to acquire in franchises, or the customary property parking-space diggers claim in some northern U.S. cities during blizzards.<sup>95</sup>

With that conceptual background, the normative objection can't be totally refuted, but it does lose force. Different systems of exclusive use can facilitate the use of owned resources in different ways. Trespass to land deals with the problems associated with rivalrousness and excludability, and inventions and works of authorship don't suffer from those problems. But property can also address the question asked "in the old children's story[:] 'but who will bake the bread?'"<sup>96</sup> For IP, exclusive use often facilitates the use of an intellectual work simply by incentivizing people to create the work. No one can take advantage of the non-rivalrousness or -excludability of an invention until it's been invented. Now, it could be that property rules and policies aren't necessary to incentivize the creation of desirable intellectual works. That possibility raises normative and empirical issues that can't be settled here. Separately, a system of property may still care to respond to non-rivalrousness and non-excludability—say, by using novelty-type requirements<sup>97</sup> and term limits<sup>98</sup> to keep IP rights narrow and the public domain broad. Here, the important point is this: if property is conceived of as a right of exclusive use, that conception doesn't create as sharp a separation between property and intellectual works as is often argued. Property law and policy may need to apply different second-level institutional strategies or third-level refinements for land or chattels on one side and intellectual works on the other. But the differences between the resources needn't make the concept "property" totally inapplicable to intellectual works.

### B. *Interferences with IP*

Patent and copyright both rely not only on the concept of property discussed in section III.B but also on the concepts associated with wrongs and other interferences, discussed in section III.C. Both fields use the Category One strategy to deal with run-of-the-mill unconsented use of IP. In both, the unconsented use of protected IP is called "infringement," analogous to "trespass."<sup>99</sup>

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<sup>95</sup> See Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 528-29 (2002); Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 824-25 (2001).

<sup>96</sup> ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 38 (2011).

<sup>97</sup> See 17 U.S.C. §§ 102-103; 35 U.S.C. § 102.

<sup>98</sup> See 17 U.S.C. § 302(a); 35 U.S.C. § 154(a)(2).

<sup>99</sup> See 17 U.S.C. § 501; 35 U.S.C. § 271.

But IP law has Category Two legal relations as well—compulsory licenses. Section 111(c) of the Copyright Act provides one good example.<sup>100</sup> That section gives a cable system permission to make a secondary transmission of a performance or display of a copyrighted work embodied in a primary transmission, on the condition that it file a statement of account for rate regulation, pay the required royalties, and get an FCC license for the primary transmission.<sup>101</sup> If the cable system doesn't follow these steps, it commits a wrong (it infringes under section 501), but the payment of the royalty and the following of the other steps give it a permission—a “statutory licens[e].”<sup>102</sup>

Of course, patent law doesn't rely on compulsory licensing nearly as much as copyright does.<sup>103</sup> That difference might lead some readers to conclude that patent and copyright are not two systems of property but rather two fundamentally different systems. To the contrary, the difference confirms that the concept “property” operates using an open-texture approach. At a middle or second level, both patent and copyright institute a presumptive arrangement in which a property holder enjoys a domain of exclusive use in relation to an intellectual work. At the most specific, third level, however, two systems of property may incorporate different limitations on these presumptive exclusivity rights, depending on how strong the claims of non-owners are to use the resource in question. Copyright is structured incorporating judgments that non-owners have strong use-claims fairly often. In some situations (parody, or fair comment), those use-claims entitle non-owners to copy a work of authorship without any liability. In other situations (section 111(c) and other compulsory licenses), use-claims entitle non-owners to copy the work without being enjoined—but on a shared judgment that the non-owner is using the work in a manner to which the owner should consent if he receives a reasonable royalty.

### C. *Orders Entering Injunctive Relief for Infringement*

Orders ruling on injunctive relief perform the same functions in IP as they do elsewhere in property-related private law remedies disputes. Courts don't rely on a property-based “right to exclude” as an automatic rule settling property remedy questions. Nor do they decide remedies questions in isolation from property-based normative reasoning. Rather, the concept of

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<sup>100</sup> 17 U.S.C. § 111(c).

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> One exception confirming the general tendency is the appeal developing countries make to justify compulsory licenses to use pharmaceutical inventions under patent in other, usually developed countries. *See, e.g.,* Jerome H. Reichman, *Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options*, 37 J. L. MED. & ETHICS 247, 247 (2009).

“property” helps institute a presumptive case for equitable relief, and the concept also focuses normative issues salient to whether an injunction should be entered.

Without being exhaustive, this section illustrates with a few cases covered in *eBay* and one major case decided in its wake. Consider first *Continental Paper Bag*.<sup>104</sup> Eastern Paper Bag held a patent in improvement to a machine making self-opening square paper bags.<sup>105</sup> But the company didn’t manufacture improved bag-making machines, and it didn’t license use of the patent; the patent blocked improvement in the industry and let the company continue to use less than up-to-date machines.<sup>106</sup> When Continental Paper Bag infringed on the patent and was sued, it pleaded that the Eastern Paper Bag patent wasn’t being used actively and that this non-use disentitled Eastern from equitable relief.<sup>107</sup> Before “considering what remedies [the] patentee is entitled to,” the Court thought it appropriate first “to consider what rights are conferred upon him.”<sup>108</sup> The Court read the patent statutes to institute a property-based strategy.<sup>109</sup> The fundamental policy of patent law was “to provide for an exclusive right to inventors to make, use and vend their inventions,” “complete monopoly,” and “absolute property.”<sup>110</sup> That property status shaped the remedies: “It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee.”<sup>111</sup> And that status did so by shaping how the relevant equitable considerations applied. As legal damages are inadequate to rectify or prevent continuing trespasses, the Court believed, so too are they inadequate to rectify continuing infringements.<sup>112</sup>

*Continental Paper Bag* might be read as suggesting that property logic mandates a right to exclude. In response to “the suggestion that competitors were excluded from the use of the new patent,” the Supreme Court did respond “that such exclusion may be said to have been of the very essence of the right conferred by the patent.”<sup>113</sup> A lot turns on what the word “essence” contributes to the argument. One can’t rule out the possibility that the Court meant that exclusion was a necessary requirement of property, and a characteristic that required an injunction to enter automatically after a finding of infringement. But this isn’t the most charitable reading of the Court’s opinion as a whole. The Court accepted that the exclusive right in a patent

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<sup>104</sup> 210 U.S. 405 (1908), cited in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006).

<sup>105</sup> *Id.* at 406.

<sup>106</sup> *Id.* at 406-08.

<sup>107</sup> *Id.* at 407.

<sup>108</sup> *Id.* at 423.

<sup>109</sup> *Id.*

<sup>110</sup> *Cont’l Paper Bag*, 210 U.S. at 423-24.

<sup>111</sup> *Id.* at 430.

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* at 429.

wasn't absolute, that there were some forms of non-use that disentitled patent holders from equitable relief.<sup>114</sup> The Court also seemed to believe that blocking didn't count as such culpable non-use; the company wasn't restricting supply or increasing prices beyond their pre-patent levels, and the company derived value from "saving of the expense that would have been involved by changing the equipment of a factory from one set of machines to another."<sup>115</sup> And separately, the Court warned that its findings regarding equity could be overridden in another case where public interests so warranted.<sup>116</sup>

Given those arguments, when the Court said that exclusion was the "essence" of the patent right, it was more likely saying that the right to exclude is a normatively essential element of the policies it had already identified as fundamental to patent law—"to provide an exclusive right to inventors," or a "complete monopoly," as an incentive for inventors to invent and disclose to the public their inventions.<sup>117</sup> On that reading, "property" exercised the influence on remedies claimed here. When patent holders deserve exclusive rights of control, use, and disposition over patents, those exclusive rights confer on them a wide zone of discretion to determine what count as valuable uses of their patents. It was at least arguable<sup>118</sup> that Eastern Paper Bag's blocking strategy contributes to general patent policy. As Lior Strahilevitz explains, it could be that, "[w]hen faced with the choice between (a) a decent paper bag machine and a blocking patent on an improved, but suppressed, machine and (b) a substantial probability that neither machine will be invented, choice (a) seems acceptable."<sup>119</sup> Of course, this prediction is debatable; Strahilevitz recognizes that it resembles a "just-so story."<sup>120</sup> But the prediction has a reasonable basis, and its critics acknowledge that the issues are partly empirical and that there aren't data to settle the empirics.<sup>121</sup>

In this light, the concept "property" didn't mandate a particular result in *Continental Paper Bag*—but it did help bring a normative choice into focus. In the remedy dispute, the concept "property" generated a substantive presumption: that Eastern Paper Bag deserved broad discretion to decide which uses of its improvement patent contributed to its interests. To the extent that this presumption held, Eastern Paper Bag deserved to prevail in its argument that legal remedies wouldn't adequately remedy the losses it

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<sup>114</sup> See *id.* at 427-28. See also John F. Duffy, *Reviving the Paper Patent Doctrine*, 98 CORNELL L. REV. 1359, 1378 (2013).

<sup>115</sup> *Cont'l Paper Bag*, 210 U.S. at 429.

<sup>116</sup> *Id.* at 430.

<sup>117</sup> See *id.* at 423-24, 429.

<sup>118</sup> The Court said, "it is certainly disputable that the non-use was unreasonable." *Id.* at 429.

<sup>119</sup> Cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 811 (2005).

<sup>120</sup> *Id.*

<sup>121</sup> See Oskar Liivak & Eduardo M. Peñalver, *The Right Not to Use in Property and Patent Law*, 98 CORNELL L. REV. 1437, 1474 (2013).

stood to suffer from infringement. On substance, however, Continental Paper Bag deserved a chance to show that Eastern Paper Bag's strategy did so little to encourage use of the improvement patent that the company didn't deserve protection for the rights of disposition it sought to protect. The maxim for adequacy of legal relief gave Continental a vehicle to make that substantive argument in doctrine. Ultimately, the Court concluded that Eastern Paper Bag got enough "use" from blocking to justify protecting the patent. That conclusion is normative, and wasn't fully settled by the relevant concepts. But the concepts did frame Eastern Paper Bag's claim for relief and Continental Paper Bag's counterarguments.

#### D. *Judgments Withholding Injunctive Relief in IP Disputes*

Similarly, a judgment refusing to enjoin future infringement plays the same roles as a judgment withholding equitable relief for a justified de minimis encroachment, as explained above in Part IV.<sup>122</sup> These judgments don't reason about remedies in isolation from property concepts and policies, and they don't appeal to non-property law and policy to limit an otherwise-runaway right to exclude. Instead, these judgments use equitable factors to apply property-based policies to limit property.

Consider *Christopher Phelps & Associates, LLC v. Galloway*,<sup>123</sup> a 2007 undue hardship decision handed down after *eBay*.<sup>124</sup> Galloway built a house using architectural plans for a residence called the Bridgeford Residence; he had acquired copies of those plans from the owner of that residence.<sup>125</sup> But Phelps & Associates held the copyright in the plans and the homeowner lacked any legal right to give Galloway a copy; Phelps & Associates sued Galloway and proved that he had infringed its copyright in the plans.<sup>126</sup> Phelps & Associates asked the district court to enjoin any future lease or sale of the house, and to order the destruction or return of the infringing plans.<sup>127</sup> The district court denied both requests; the Fourth Circuit affirmed the first but vacated and remand for the district court to reconsider the ruling on the plans.<sup>128</sup>

The holding on the plans accords with what was said in the preceding section. Because the district court didn't apply the *eBay* factors, the Fourth Circuit remanded for the district court to apply those factors in the first in-

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<sup>122</sup> Provided that the court orders the infringing defendant to pay an appropriate amount in monetary relief.

<sup>123</sup> 492 F.3d 532 (4th Cir. 2007).

<sup>124</sup> *Id.* at 543.

<sup>125</sup> *Id.* at 535-36.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 537.

<sup>128</sup> *See id.* at 535.

stance.<sup>129</sup> But the circuit court noted, “The risk of future infringement includes the possible use of plans to build another house, publication of the plans, or other violations of the exclusive rights conferred by 17 U.S.C. § 106.”<sup>130</sup> The concept “property” vested in Phelps & Associates exclusive discretion to decide whether the plans could be published or used to build another house.<sup>131</sup> That discretion created a presumption that Phelps & Associates deserved a legal power to deny Galloway any further access to the plans.<sup>132</sup> *eBay*’s irreparable harm and adequacy of legal remedies factors supplied focal points where Phelps & Associates could express this presumption—and Galloway could challenge it.<sup>133</sup>

More interesting here, when the Fourth Circuit affirmed the denial of the request for an injunction barring further sale or lease, it assumed the same expressive and substantive conceptions described in Part IV. Expressively, the Circuit didn’t describe its holding as conferring on Galloway a compulsory license, to take and use Phelps & Associates’ plans on payment of a court-set royalty. Indeed, the Circuit noted: “Damages at law will not remedy the continuing existence of Phelps & Associates’ design in the Galloway house.”<sup>134</sup> Under the hardship factor, though, the circuit court concluded that Galloway faced the worse hardship.<sup>135</sup> An injunction against future sale or leasing of the house would not do anything to prevent any further misappropriation of the plans, the house had a functional character separate from its tendency to infringe on Phelps & Associates’ copyrighted plans, and an injunction would have encumbered property and labor of Galloway unrelated to the infringement.<sup>136</sup> In short, Galloway committed a wrong; damages were needed to rectify the wrong; but for unusual reasons an injunction wouldn’t rectify the wrong but would instead be “overbroad,” likely to “encumber a great deal of property unrelated to the infringement,” and “punitive [in] character.”<sup>137</sup>

Also consistent with the preceding part, this expressive message ran with a substantive determination—of Phelps & Associates’ property rights to dispose of the architectural plans on terms of its choosing. The Court didn’t say that Phelps & Associates had a right to exclude, which needed to be limited to prevent holdouts. Substantively, the Court found decisive that there were *two* legal *res*—one for the copyrighted plans, and another for Galloway’s house, which had a functional use separate from its embodying

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<sup>129</sup> *Phelps & Assocs.*, 492 F.3d at 535.

<sup>130</sup> *Id.* at 547.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* at 546-47.

<sup>133</sup> *See id.* at 543.

<sup>134</sup> *Id.* at 544.

<sup>135</sup> *Phelps & Assocs.*, 492 F.3d at 544.

<sup>136</sup> *See id.* at 544-45.

<sup>137</sup> *Id.* at 545.

the Bridgworth plans.<sup>138</sup> So substantively, the Court needed to determine as a general matter whether a copyright holder's exclusive right to decide whether to transact with a copyright entitled it to restrict substantially the rights of the owner of a functional article to use and enjoy that article.<sup>139</sup>

Now, because it involved two legal *res*, *Phelps & Associates* is an unusually simple and clear-cut case for undue hardship. Even so, the conceptual relations at work in that case can be applied in other cases—say, the small-component/big-assembly disputes that troubled Justice Kennedy in *eBay*. In *Dun v. Lumbermen's Credit Ass'n*,<sup>140</sup> the Supreme Court affirmed a finding of undue hardship made in a copyright infringement dispute between the authors of two books of business listings.<sup>141</sup> (*Dun* was decided in 1908, the same year as *Continental Paper Bag*, which reinforces my impression that the latter case didn't suggest that property mandates injunctions.) The defendant lifted entries from the plaintiff's book, but the defendant's book had 25 percent more listings, the book focused on different lines of business, and it expressed specific judgments about different businesses studied differing from the judgments made by the plaintiff in its book.<sup>142</sup>

The Court concluded that the infringing material comprised too small a portion of too different a book to say an injunction was warranted.<sup>143</sup> The Court's determination shows how property substance interacts with remedies' legal structures. In property-based terms, the Court was dealing with a specification problem. In such a problem, the defendant misappropriates some of the plaintiff's property, but transforms the property into a new resource so different and valuable that she acquires an entitlement to the transformed resource.<sup>144</sup> In *Dun*, to say whether the plaintiff's rights of disposition over the copyright entitled it to enjoin the defendant's creation and use of its book, it needed to determine whether the book was different enough from the infringing material that it was a different *res*. The remedial

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<sup>138</sup> See *id.* at 544 (noting that “a house or building . . . usually has a predominantly functional character,” and citing persuasive authorities refusing to treat completed houses as deserving of injunctive relief to stop copyright infringement).

<sup>139</sup> *Id.* at 545 (“[Galloway’s] interest in remaining [in the house], with the same rights as other homeowners to alienate his property, is substantial and, in this case, trumps Phelps & Associates’ interests . . .” (emphasis added)).

<sup>140</sup> 209 U.S. 20 (1908).

<sup>141</sup> *Id.* at 23-24. *Dun v. Lumbermen's Credit Ass'n* was cited by the *eBay* Court. *eBay v. MercExchange*, 547 U.S. 388, 393 (2006).

<sup>142</sup> *Dun*, 209 U.S. at 23.

<sup>143</sup> *Id.* at 23-24.

<sup>144</sup> The fact pattern described in text is an example of “specification,” which provides one of several specific examples of a broader category of “accession.” See Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 103 (1922). On accession in IP, see Peter Lee, *The Accession Insight and Patent Infringement Remedies*, 110 MICH. L. REV. 175, 195-202 (2011); Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 86-93 (2009).

factors associated with equity provided the normative and legal criteria for the courts to make that substantive choice. (The Court affirmed a finding of undue hardship and affirmed the refusal to enjoin the use of the defendant's book.<sup>145</sup>)

And as in *Phelps & Associates*, the Court didn't describe the legal relations as the defendant exercising any sort of option to a purchase of the plaintiff's IP. Nor did it describe the denial of the injunction as a rejection of a right to exclude model. The Court approvingly quoted from the findings of the circuit court, the court that first denied the request for injunctive relief: although the lifting of listings was ordinarily "held to indicate a substantial theft of copyright property," after taking "note of the character of the items alleged to be appropriated on the one hand and the consequences of granting the injunction prayed for, it would be an unwarrantable use of the power of the court to do so."<sup>146</sup> The plaintiff had property. The defendant had committed "theft" to that property. Under the circumstances, however, to give the plaintiff power to enjoin the defendant's use of a (largely non-infringing) work would have given the plaintiff relief "unwarranted" in relation to his substantive rights of disposition.<sup>147</sup>

## VI. RECONSIDERING THE CONCEPTUAL VIEWS IN *EBAY*

### A. *The Right to Exclude View*

The portrait of property and remedies developed in the previous two parts helps clarify the views about both presented in Part I. Consider first the most extreme form of the right to exclude view—the view whereby property mandates an injunction, and any order denying an injunction applies non-property principles to limit the perverse effects of property. As shown here, property-based policies not only justify but also limit property rights. The property-based policies that justify owners' having a right to dispose stop owners from claiming such rights, when claimed rights seem likely to restrain others' free exercise of their own rights of liberty or property.

The previous two parts also show what is sound and problematic in the portraits of the right to exclude assumed by judges in *eBay*. As Part I showed, the Federal Circuit assumes that the concept of the right to exclude more or less requires injunctive relief; Chief Justice Roberts assumes that this concept is the problem that injunctive relief is meant to solve. Both of

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<sup>145</sup> *Dun*, 209 U.S. at 24.

<sup>146</sup> *Id.* at 22-23.

<sup>147</sup> *See id.*

these views are in the ballpark, but they stand in tension with one another and could be qualified.

When the Federal Circuit suggests that injunctions should generally issue because the “right to exclude . . . is but the essence of the concept of property,”<sup>148</sup> it is partly right. Property law does confer on IP holders presumptively exclusive rights of control and disposition. Easy access to injunctive relief confirms and protects that control and disposition, and those rights encourage the inventive and productive activities patent and copyright systems should foster. But the Federal Circuit’s conceptualization could be read to mean that an IP holder always has a right to an injunction—even when (in a case like *Phelps & Associates* or *Dun*) the infringer has a strong interest in the uses to be enjoined and the IP holder lacks a significant interest in blocking those uses. In situations like these, the ordinary justifications for rights of disposition don’t justify the IP holder’s claims to direct the disposition of the IP. Courts can express that normative prescription through the *eBay* factors, by concluding that legal relief will be adequate, that the IP holder can’t prove irreparable harm, or that the infringer faces undue hardship.

Chief Justice Roberts comes closer to the mark. He justifies a presumption for injunctive relief against continuing infringement “given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee’s wishes.”<sup>149</sup> Roberts appreciates, correctly, that the concept of a right to exclude is underdeterminate. He appreciates, correctly again, that ordinarily an owner enjoys a right to dispose of an asset—i.e., to exercise his “wishes” to decide whether and on what terms to transact with others about the asset’s possible use.<sup>150</sup> And also correctly, Roberts appreciates that equitable factors recognize this right, by enabling IP holders to argue that they don’t get adequate legal relief when they’re paid damages for infringement.

Roberts would have gotten closer to the mark, however, had he described the IP holder’s right not as a right to exclude, but as a right of exclusive use. The right to exclude seemed inadequate to Roberts because the IP holder has an interest not merely in exclusion but in the exclusive use of the IP. The IP holder suffers irreparable harm, and doesn’t get adequate compensation from money damages, because the damages don’t adequately vindicate the IP holder’s interest in determining who may initiate transactions with the IP and what uses may be made of the IP after such transactions.

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<sup>148</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005) (quoting *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) (internal quotation marks omitted)), *vacated*, 547 U.S. 388 (2006).

<sup>149</sup> *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring).

<sup>150</sup> *Id.*

### B. *The Little or No Relation View*

By contrast, the Court opinion in *eBay* created a serious possibility for confusion when it suggested that “the creation of a right is distinct from the provision of remedies for violations of that right.”<sup>151</sup> So too the opinion of the district court, when it applied the relevant equitable considerations on an ad hoc basis. And so too Justice Kennedy’s opinion, to the extent it suggested that every new equity case be decided on its own facts.

These passages could be read narrowly, as responses against a mistaken conception of property as an overbroad right to exclude. If that were all that was meant, these passages would be understandable. As this Article has shown, however, there’s a better response, to clarify why property isn’t an overbroad right to exclude. And several of these passages—especially the ones from Judge Friedman and Justice Kennedy’s concurrence—go further and suggest that, in a large group of infringement proceedings, remedy determinations should be made on a blank slate. This is a conceptual error, and it is as significant as the errors encapsulated in the “Cathedral”-related concept of a liability rule. The concept “liability rule” is misleading because it describes monetary relief awards in a manner indifferent to the normative guidance expressed by different judgments of liability and monetary relief. The little or no relation view is misleading because it suggests that the remedies issued in a dispute aren’t shaped by: the underlying right; the policies that specify when the right is infringed on, interfered with justifiably, or interfered with in a way requiring a money payment; and the judgment how that right was interfered with.

## VII. IMPLICATIONS

Most of what was been developed in the previous four parts is conceptual, and normative only in the sense that the concepts assume commonly shared and minimally reasonable understandings of “property,” “IP,” and the goals associated with both. But if one finds satisfying the justifications underlying IP and its rights structure, the conceptual confusions identified thus far are concerning normatively.

In large part, the patent and copyright systems aim to confer to IP holders property as a reward for their (respectively) inventive or creative efforts. For this reward system to work, owners must have broad presumptive freedoms to decide which rewards are significant enough to justify inventive or creative activity. They must also have freedom to decide which commercial strategies are most likely to lead to that reward: production with the IP; selling the IP to a producer or an intermediary; entering into

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<sup>151</sup> *Id.* at 392 (majority opinion).

one or several licensing arrangements; or—think of *Continental Paper Bag* again—even more counterintuitive strategies. If IP rights don't generate some rough starting expectation for injunctive relief, when IP holders litigate against infringement, they must introduce specific evidence showing why different forms of monetary relief won't adequately compensate for disruption to their use and commercialization plans. That requirement seems likely to compromise the security of their IP.

Several of the opinions in *eBay* raise this possibility. Even though the *eBay* Court opinion doesn't mandate this possibility, it suggests it by refraining from taking any position “on whether permanent injunctive relief should or should not issue . . . in any number of other disputes arising under the Patent Act.”<sup>152</sup> Judge Friedman's opinion does suggest this possibility. That opinion assigns to MercExchange the burden of persuasion on remedies, and it doesn't treat MercExchange's patent rights as helping MercExchange meet that burden.<sup>153</sup>

Justice Kennedy's concurrence falls somewhere in between. In my opinion, Kennedy assumes that property principles can inform remedy determinations in what he considers run-of-the-mill infringement cases, but he wants to encourage courts to write on a blank slate on what he considers cases of first impression: business method patents, IP holders that extract commercial value from their patents through licensing, and small-component/big-assembly disputes. For those topics, Kennedy's concurrence creates the uncertainty for IP holders that Judge Friedman's opinion created generally.

Even here, conceptual assumptions can influence normative analysis in different ways. I find most concerning the distinction Justice Kennedy drew between IP holders engaged (on one hand) in “producing and selling goods” and (on the other hand) “obtaining licensing fees.”<sup>154</sup> This suggestion threatens the substantive property rights that IP holders ordinarily have in deciding whether to use their IP through licensing. When “property” confers general freedom of disposition to IP holders, presumptively, it confers on them discretion to decide whether to license or to produce and sell, without favoring one or the other. Here, the Federal Circuit was far closer to the mark; IP holders deserve equal protection whether they “intend to practice their patents” or “choose to license,” and injunctions shouldn't be reserved for the former only, because “[t]he statutory right to exclude is equally available to both groups, and the right to an adequate remedy to enforce that right should be equally available to both as well.”<sup>155</sup>

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<sup>152</sup> *Id.* at 394.

<sup>153</sup> *See id.* at 393 (criticizing the district court order for “appear[ing] to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases.”).

<sup>154</sup> *Id.* at 396 (Kennedy, J., concurring).

<sup>155</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006).

To be clear, a better concept of property wouldn't require that all IP holders get injunctive protection—but it does prescribe presumptive protection for IP holders making some minimal, good faith use of their IP. Thus, IP holders who actively license would deserve protection; IP holders who file submarine patents and use them solely for litigation and not licensing would exceed the bounds of presumptive protection; and blocking patents like the one in *Continental Paper Bag* would remain cases hard to settle with the presumption or its overrides.

In other disputes, bad concepts don't automatically lead to any single result—but they can short-circuit helpful habits of reasoning already worked into law. This is the concern raised by Justice Kennedy's references to situations in which a “patented invention is but a small component of the [infringer's] product . . . and the threat of an injunction is employed simply for undue leverage.”<sup>156</sup> A sound and robust conception of property doesn't generate any strict rules for undue hardship cases, in IP or elsewhere. But it does help decision makers develop a checklist of salient factors to consider—to try to get the equities right in individual cases, and to keep the relevant law consistent across similarly situated cases.

In property disputes, undue hardship doctrine incorporates four important considerations. First, undue hardship is better understood as a defense than a free-standing requirement or a requirement for the plaintiff to prove.<sup>157</sup> That positioning clears space for a second point: if the owner is making any deliberate and non-trivial use of its property, that use ordinarily satisfies the irreparable harm or inadequacy-of-legal-relief factors. Third, in property disputes, to respect owners' freedom to decide whether and how to dispose of their property, the hardship on a defendant must greatly exceed the plaintiff's harms before the former can be said to suffer undue hardship. And last, courts must examine how avoidable the property taking was and how deliberate it was, to avoid encouraging deliberate and concerted challenges to property rights.<sup>158</sup>

These considerations might not apply to IP disputes exactly as they do in real property disputes. For example, it's not easy to say as an empirical matter whether it's as easy to avoid patent infringement as it is to avoid trespassing on land. That uncertainty makes it hard to say whether undue hardship should focus as much on the difference between careless and innocent takings in IP as it does in real-property encroachment disputes.<sup>159</sup> Nor is it easy to make across-the-board generalizations to predict when the hardships should tip against an injunction—or comparisons of these rules of

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<sup>156</sup> *eBay*, 547 U.S. at 396 (Kennedy, J., concurring).

<sup>157</sup> See, e.g., LAYCOCK, *supra* note 16, at 340.

<sup>158</sup> See Epstein, *supra* note 82, at 2100-01.

<sup>159</sup> On scenter, see Lee, *supra* note 144, at 208-11; Newman, *supra* note 144, at 112-20. On empirics in real property and IP, see Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1704-10 (2013).

thumb across fields like real property and patent. These issues are normative, and neither the general structure of remedies nor the specific doctrines of undue hardship settle them.

My point here is narrower. Traditional notions of property and undue hardship might provide a helpful checklist of indirect-consequentialist factors to consider in IP disputes. If a decision maker assumes that remedies have little or relation to property rights in small-component/big-assembly disputes, she predisposes herself not to consider any of the relevant considerations at all.

## CONCLUSION

This Article has demonstrated three conceptual points about IP remedies disputes. First, if one takes seriously the conceptual content of the key terms in property torts and remedies disputes, “property” rights often entail presumptive rights to dispose of owned resources, subject to override when a non-owner has unusually strong reasons for transacting with and using a resource. Second, remedies law is the field where the presumption is enforced and the override conditions are specified. As a result, principles of remedies law are parasitic on and symbiotic with property law and policy. Third, what’s true in property torts generally applies the same way to the class of IP remedies disputes typified by *eBay*.

A sound understanding of these relations is important, both as a matter of social philosophy and as a response to the legal issues left open by *eBay*. But this analysis has also illustrated some more practical implications. Throughout property law and scholarship, there is a tendency to assume that the concept “property” creates an all-or-nothing choice. Either an owner has a near-unqualified right to exclude, or she doesn’t, and a public official may price access to an owned resource considering the values not only its owner but also of claimants transacting with it without the owner’s consent.

That assumed conceptual backdrop informs perceptions in IP remedy disputes. The Federal Circuit portrays the property in a patent as a “right to exclude.” This portrait encourages onlookers to think that the “property” in a patent triggers a categorical presumption for injunctive relief. Critics of broad property principles have reasons to go along with the Federal Circuit’s inaccurate portrait. After all, that portrait makes the property in IP seem extreme, and needing of containment by non-property legal sources. That framing informs the Court opinion in *eBay*, Justice Kennedy’s concurrence, and academic commentary on the *eBay* decision.<sup>160</sup>

This conceptual framing makes the little or no relation view of remedies seem necessary or inevitable, when it isn’t. And this conceptual fram-

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<sup>160</sup> See Lemley & Weiser, *supra* note 4, at 783-84, 840; see also Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REG., Fall 2007, at 36, 36-37, 41-42.

ing delegitimizes several standard property-based justifications for IP. Maybe these justifications are unsatisfying, and IP needs to be revised. If that revision is going to happen, however, better that it do so openly, through normative argument—not through conceptual confusion.