

A response to Peter Menell

The Property Rights Movement and Intellectual Property

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The fall issue of *Regulation* contains a provocative attempt by University of California, Berkeley law professor Peter Menell to discredit what he calls the property rights movement (PRM) for its supposed “absolutist” stance on intellectual property (“Intellectual Property and the Property Rights Movement”). As part of the article, Professor Menell projects the image that I participate in (or perhaps even lead) a movement that poses a profound danger to the efficient operation of our complex system of intellectual property law, especially as it relates to patents and copyrights. In general, I do not like to think of myself as part of any “movement” because politics is not my business. I am concerned only with stating my own positions as best I can and not with making the compromises necessary to gain political support. But for these purposes, I shall acquiesce in this characterization in order to challenge what is, at the end of the day, only a one-count indictment, which is that people of my ilk do a great public disservice by championing the unthinking extension of rigid notions of law for tangible property to the more nuanced domain of intellectual property. In Professor Menell’s mind, the great intellectual vice of the PRM is to “port’ the absolutist libertarian vision to the realm of intellectual property.”

Professor Menell’s initial exhibit of this regrettable tendency is not any piece of academic writing by me or anyone else. Rather, he quotes from an advertisement that the Washington Legal Foundation placed on the *New York Times* opinion page on May 21, 2007, under the title “Stolen Property,

Stolen Future.” The alleged vice of this ad was to “blithely” create an equivalence between tangible and intangible property by asking:

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

This statement is not as foolish as Menell indicates if one takes the time to read the rest of the ad. The organization was not talking about the fine points of intellectual property law that occupy appellate judges. Rather, it was issuing a call to action to public officials against the serious problems of the wholesale piracy of American intellectual property abroad and the introduction of counterfeit drugs and surgical devices into the United States. The ad was right to insist that widespread counterfeiting may put ordinary people in peril of their lives and it was equally correct to insist that systematic piracy results in a massive disruption of the economic system by rewarding wrongdoers who have contributed nothing to wealth creation. Whatever the differences between tangible and intangible property, none of them matter for the urgent problem of devising effective countermeasures to piracy and counterfeiting. The transference of sentiment from tangible to intangible property looks quite good in this particular setting. I believe Professor Menell would not disagree with any of the particular concerns raised in the advertisement.

Menell’s concerns also touch sensitive political issues, for he upbraids the PRM for seeing “in the Constitution’s Takings Clause uncompromising protection of property, founded in liberty” in its criticism (along with the vast majority of the American people) of the Supreme Court’s 2005 decision in *Kelo v. City*

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of *New London*. But he misconstrues the PRM's key objection. The amicus brief that I prepared with Mark Moller, then of the Cato Institute, in *Kelo* did not argue that the takings clause gives absolute protection to private property from government takeover; after all, the clause gives explicit authorization of government takings for public use. But what counts as public use? The term clearly includes all takings where the property is to be used for state-run activities for the public at large, and even those — e.g., railroads — that are privately owned but are under a common carrier obligation to take all comers.

Indeed, we insisted that the public-use requirement also allowed the government to respond intelligently to a genuine holdout problem even when universal public access was not guaranteed as of right. Specifically, we recognized that the government could authorize takings for private use so long as the holdout problem was real and the subjective value of the property taken was negligible. Those twin conditions are satisfied, for example, when the owner of a mine needs to mount an aerial tram over scrub land to reach the nearest railroad line. But tragically, Ms. Kelo's situation was exactly the reverse: she had an intense attachment to her home that blocked no development project. Our simple plea was to hold off throwing people out of their homes for land that will (and still does) remain barren. Menell never explains why this position is dogmatic.

The obvious question is how do Menell's misguided broadsides reveal the supposed intellectual naiveté of the PRM? Its sins are apparently of two sorts. The first involves the overall structure of property law. The second involves the structure of patent law, with special attention given to the question raised in *eBay v. MercExchange* of whether, in Menell's words, it is proper to insist that "the MercExchange patent deserved much the same protection as real estate."

PARITY BETWEEN TANGIBLE AND INTELLECTUAL PROPERTY

Professor Menell's initial error is to offer an oversimplified and incorrect general analysis of the relationship between tangible and intellectual property. He believes that the absolutist view that governs tangible assets does not work well for intangible ones. In this analysis, he makes two errors: he assumes that tangible property relies on absolutist conceptions, and he denies the instructive parallels between the two systems when they are properly understood.

Menell mistakenly attributes to me an effort to "shoehorn intellectual property into an idealized Blackstonian conception of property as exclusive and inviolate." He references Blackstone's famous sentence that speaks of private property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." Unfortunately, Professor Menell has hit the wrong target, for I explicitly reject the Blackstonian conception of tangible property. By way of example, my 2001 *Indiana Law Journal* paper "Intellectual Property: Old Boundaries and New Frontiers" criticizes Blackstone for his "injudicious overgeneralization" that overlooks the wide variety of differences in var-

ious forms of tangible property. Most concretely, Blackstone recognizes that water is incapable of absolute ownership but instead is subject only to "temporary, transient, usufructuary property." The overall situation is even more complex than Blackstone's account, for outside England there are multiple property rights regimes of water, each of which has distinctive features that are heavily dependent on the topology of different regions. The system of riparian rights that works with gentle English streams is wasteful for raging western rivers whose riparians are located on bluffs 100 or more feet above the water. I further noted that the efficient solutions for oil and gas extraction also do not follow the land paradigm, given the flowing nature of the underground resources.

Next, I sought to explain why the vaunted exclusivity of land is subject to serious and principled qualifications. The law of nuisance explicitly allows for deviation from strict boundary rights between neighbors. The live-and-let-live rules permit all landowners to engage in certain low-level nuisances that result in physical invasions of their neighbors' land on the grounds that each benefits more from the productive activity than they suffer from the trivial invasion of their space. High transactions costs preclude reaching this equilibrium position through voluntary negotiations, which is why these reciprocal easements have long been imposed as a matter of law. In the opposite direction, the need for lateral support between landowners is so imperative that the law imposes reciprocal obligations of support between neighbors. Finally, in circumstances of necessity, one individual may enter the property of another without his permission, even though he is subsequently required to compensate the property owner for any damages so caused and any (usually small) rental fees involved.

The exceptions to the Blackstone claim also include common property such as highways and beaches that are open to all. Similarly, transportation and communication systems, even if privately owned, operate as open access regimes that require their operators to offer service on reasonable terms to all comers. Nor do the forms of property interests remain static in the face of technological changes. The relaxation of the Blackstone rules with respect to overflight rights or electromagnetic transmissions marks an important and principled deviation from Blackstone's principle of exclusivity.

This mixed conception of property entitlements is not confined to tangible property but also extends to the entire realm of cyberspace, which depends on the same distinction between the open elements of the system — the Internet highway — and the private sites that connect up to it. The key point on the Internet is that no person is allowed to disrupt communications along its common elements, but that an open access regime hardly precludes the use of strong legal protection for the individual sites that connect to the common element. This proper structure of cyberspace came to a head in the much-discussed 2003 *Intel v. Hamidi* decision in which Intel sought to get an injunction against former employee Kourosh Kenneth Hamidi's repeated and unauthorized use of its servers to spread messages of fear and discord to Intel employees. Intel argued that it was entitled to

enjoin that use, just as it could prevent Hamidi from speaking in its lobby or going door-to-door inside its offices and factories. That argument succeeded in the California intermediate court, which held that Intel was not only entitled to use self-help to block the messages from coming into its servers, but also to enjoin any person whom it specifically instructed to cease sending e-mails into its site.

One doctrinal obstacle to Intel's position is that the law has generally not awarded injunctions against trespass to chattels in the absence of physical harm, such as disruption of the server, even though it routinely awards them to trespasses against land. Those precedents, however, never involved the complex operations of cyberspace, but only covered such isolated actions as lifting a dog up by its ears, where the simple response is to lead the dog out of harm's way. The California Supreme Court (by a 4-3 vote) took the wooden position that the rules that governed ordinary chattels applied equally to cyberspace and denied the injunction while recognizing Intel's right to use self-help to keep unwanted messages off its servers.

In so doing, it explicitly rejected the argument that I made in an amicus brief that cyberspace should be regarded as a complex system like land, such that no one could block access to the Internet generally but anyone could enjoin the unauthorized use of his own particular site. The point quite simply was that the same division of private and common property that existed in physical space should be carried over to cyberspace. In making its conclusion, the court invoked an incorrect analogy between unauthorized use and the transmissions of radio signals in real space. With respect to telecommunications, the property rights are shifted entirely so that no one can use self-help to jam signals that go over his property. It never explained why, if self-help was allowed for unauthorized use cases, the injunction should be denied when those measures failed. In addition, it raised the bogeyman that injunctive relief in this case would stop all Internet communications unless permission was first obtained from the website owner. In so doing, the Court misstated the rules on communications by ordinary mail and phone service, where the rule is that one can send any kind of letter or make any kind of phone call until explicitly instructed by the property owner not to do so. Intel gave Hamidi explicit notice on multiple occasions. And finally, the California Court uttered the quite preposterous statement that the term "Internet" has nothing to do with network industries because the term "net" derives from a "fishnet" or chattel. The result of its decision was to encourage "cat and mouse" games between invader and owner, when an efficient system would allow an owner to avoid the huge expense of self-help by obtaining legal assistance against a known intruder.

CONSEQUENTIALIST APPROACH The point of this exercise is to show that all complex property systems, wherever located, require some mix of absolute and common elements to maximize the value of the underlying resources. Stated otherwise, my supposed absolutist position is anything but. One

starts off with land (but not water) with the presumption that the right to exclude, use, and dispose of property is absolute. But in the next breath the law subjects that initial presumption to scrutiny in order to find those situations where the reconfiguration of rights, as in the cases mentioned, will lead to overall social improvements, typically by increasing in high transaction cost settings the value of property entitlements through the forced transformation of property rights. The overt program, as I have said on countless occasions, is instrumental and consequentialist. The libertarian conception of property rights often associated with Locke and Blackstone plays a key role in the grand scheme by setting the initial baseline against which all future modifications of property law should be measured. But no one thinks that those rights are such sacred absolutes that no deviation is possible, even to deal with frictions at the boundary lines or the facilitation of transportation and communication networks.

None of those critical permutations, however, leave property rights in perpetual limbo, for they do not call into question the basic notion that no individual may just treat someone else's property as if it were his own. Of course, it makes perfect sense to allow planes to fly far above occupied land. That said, it makes no sense to allow them to land wherever they please, even if they pay a license fee determined thereafter by the state. Power companies may be entitled to condemn easements to run their wires, but not to occupy private homes. Hamidi can send whatever messages he likes over the Internet, but not to e-mail addresses that have sent him a "do not enter" message. For all ordinary interactions between neighbors, large physical invasions should be — and are — treated as *per se* wrongs. In virtually every case, a property owner is allowed to regain possession of his property from the entrant and to recover damages for interim losses.

UNDERSTANDING INTELLECTUAL PROPERTY

Professor Menell's false charges that the PRM adheres to Blackstone's model of property rights as "perpetual, exclusive, and inviolate" leads him to attribute strange positions to his adversaries that they do not in fact hold. Here are some examples:

Initially, Professor Menell notes that many libertarians think that all forms of intellectual property are suspect, given the limitations that they place on the ability of ordinary people to speak their mind and to use their labor as they see fit. The point is both true and ironic. True, because there are many libertarians who are not consequentialists and who therefore do not see how the systematic protection of intellectual property works to the long-term advantage of us all. Ironic, because it appears that some libertarians afford absolute protection to a species of property that other libertarians refuse to recognize at all. But in the next breath, Menell misreads the political tea leaves by calling the PRM "antigovernment," which is not so. I rely on the state to enforce the complex set of intellectual property rights.

Professor Menell next claims that the limited duration of patents and copyrights is inconsistent with the perpetual duration of real property. But he never identifies just who defends unlimited property rights in patents and copyrights.

My own position on the issue is identical to his. With copyrights and patents, perpetual rights are more costly than with land because inventions and writings can be used by many people at one time, so limited terms are fully justified. (Interestingly enough, nonrivalrous use is not a feature of trademarks, trade names, and trade secrets, which is why they receive and deserve permanent protection). From the outset, for example, I have been an outspoken opponent of the Copyright Term Extension Act that Congress passed in 1998 as a sop to the Gershwin Estate and the Disney Corporation. The duration of copyrights (at life of the creator plus 75 years) is entirely too long. No commercial interest should ever be tied to the life of its creator, which means that a young author receives, on average, far greater protection for his works than an older one. Yet at the same time I have been strongly critical of the very short periods of effective use that are available to patents in some critical areas, such as pharmaceuticals, where roughly half the officially allotted 20-year term is lost in clinical trials and regulation delays, even with the limited extensions that are allowed under the Hatch-Waxman Act.

especially since the case for taking real property under eminent domain is far more powerful for land than it is for any form of intellectual property. I doubt, for instance, that any member of the PRM wants literary critics to be able to criticize an author only with his or her express consent, or to cast aside the experimental use privilege under Hatch-Waxman. It makes good sense to allow the new entrant to prepare for sale, but not to market, a competing product during the original product's exclusivity period so that he can hit the ground running once the patent has run its course. It is instructive that Menell does not cite any PRM theorist to attack these propositions that he supports, because none do.

Next, Menell does not specify his supposed objections to the PRM. Rather he gives a general, efficiency-based account of how various forms of intellectual property should be devised in light of the various tradeoffs that have to be made — none of which has anything to do with either the Washington Legal Foundation attack on pirates and counterfeiters or with the injunction question raised in *MercExchange*. Thereafter his more diffuse discussion of a number of disconnect-

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But what does limited life have to do with the overall structure of patents and copyrights? Menell notes, correctly, that patent law has many different “levers” by which to adjust the incentives extended to inventors. He fails, though, to understand how the levers interact. Strong property protection via injunctions during a limited patent life spurs innovation, which also means that inventions enter the public domain more quickly on expiration. By cutting down the patent yield during the initial protected period, *MercExchange* makes it highly unlikely that an inventor can recoup his expenditures in the short period allowed, which translates into fewer inventions in the follow-on period. So long as it is possible to make the appropriate adjustments on patent length, why fiddle with other dimensions of patent protection in ways that introduce various kinds of uncertainty, especially the valuation issues associated with compulsory licenses? Just where does the PRM fall down here?

Professor Menell also notes that patent law has its experimental use limitation (for Hatch-Waxman) and copyright has its fair use limitations. The law of tangible property also has its privileges, so it is no far stretch to allow similar well-defined privileges to arise in both copyright and patent law. Menell claims that it is a “substantial exaggeration to suggest that ‘exclusivity’ of rights in the intellectual property context mirrors that concept in the real property context.” But, as shown, exclusivity in real property is far less absolute than he claims,

ed topics further undermines his critique of the PRM.

Finally, Professor Menell stresses yet again that, with property rights, one size need not fit all. This is a proposition that I have often defended. One example is the difference between pharmaceutical patents and genomic patents, a topic on which I have written elsewhere at length. Unlike pharmaceutical patents, genomic patents seek to gain protection for natural substances. The protection of “isolated and purified” substances dates back to Learned Hand’s 1911 decision in *Parke-Davis & Co. v. H.K. Mulford Co.* that treated isolated adrenalin as a new “composition of matter” that was able to be protected from others who isolated the identical substance by different means. Two generations later, that decision spurred on the vital genetic revolution. But, as I have argued elsewhere, protection has gone overboard insofar as it allows those persons who have isolated the BRCA gene for breast cancer to patent not only its use outside the body, but to prevent persons from receiving treatment of their own genetic disorders without the approval of the gene patent holder. That protection is too broad. Gene patents should be limited to those substances that are in a commercialized test tube, not those that remain locked in a cell.

EBAY V. MERCEXCHANGE, AT LAST

We are at last in a position to address the Supreme Court’s unfortunate decision in *MercExchange*, which inspired Menell to pen his critique. Among my transgressions as “one of the

PRM's leading theorists" — he mentions no one else by name in the article — is coauthoring an amicus brief with Scott Kieff and Polk Wagner in the 2006 Supreme Court case.

The precise issue in *MercExchange* was whether a plaintiff was entitled to an injunction as a matter of course against a defendant who has been found to have infringed the plaintiff's patent. The injunction, of course, is a direct order that the defendant no longer infringe, backed by the power to hold those who violate it in contempt of court. The point of our discussion of encroachment in real property cases was to stress that there was much case law support for the sensible proposition that deliberate and substantial invasions of property should lead to an order to cease and desist. For land, this demand could require encroachers to rip down expensive buildings unless they pay a king's ransom to the property owner to purchase a license to maintain their structure. The severe sanctions are justified because they preserve voluntary markets by giving potential builders good reason to stay on their side of the boundary line unless they have purchased the permission to enter someone else's land. Some exceptions might be made for trivial incursion done by inadvertence, but any wholesale violation of property rights is subject to that rule.

This set of institutional arrangements does not carry over

ited life of a patent is likely to reduce the level of innovation while increasing the administrative costs of running the entire system.

Our position did not represent the majority view among patent professors, which was expressed in a brief authored by Mark Lemley of Stanford Law School that was signed by 52 law professors, including Professor Menell. Their brief did not argue that injunctions are never appropriate in patent infringement cases, but insisted that the proper approach was to apply what they deemed to be the traditional rules of equity courts (i.e., those courts that were charged with administering injunctions). Those rules are said to use a fourfold test to answer this particular question:

- Is there irreparable harm if the injunction is not issued?
- Does the plaintiff have an adequate remedy at law that is in the form of monetary damages?
- Would granting the injunction be in the public interest?
- Does the balance of hardship tip in favor of the plaintiff?

The first two points really ask the same question in two different ways. The critical question in social terms is what is

There was much support for the sensible proposition that deliberate and substantial invasions of property should lead to an order to cease and desist.

perfectly to patent cases where the fact of infringement is harder to determine outside the piracy context, owing to the lack of clear boundaries that surround any patent. But in *MercExchange*, the Supreme Court was not asked to reexamine the soundness of any factual determination on patent scope or validity; instead the Court decided what remedy is generally appropriate when the deliberate and substantial infringements of patents have been found to take place. Our argument was that the injunction was preferable to any damage award for at least three reasons:

First, there are real difficulties in calculating the damages owed to the plaintiff. Just the change in market structure brought about by the admission of an illegal competitor makes those calculations difficult because the patentee is entitled to receive his monopoly profits as an inducement for early development.

Second, any system of damages allows countless individuals to infringe the patent, which in turn undercuts the ability to maintain a coherent system of voluntary licenses either on an exclusive or nonexclusive basis. It makes little or no sense to put to the patent owner the task of suing countless infringers, some of whom could not pay damages when found responsible.

And third, systematic under-compensation during the lim-

gained by inviting courts to throw in the third and fourth points. In our view, the additional inquiries, which are expensive to maintain, rarely have any weight and simply allow the obfuscation of the issue of whether the right to exclude that the patent law grants on its face should be undermined by costly hearings on a myriad of factors. High administrative costs and added legal uncertainty hardly serve the cause of technical progress that Professor Menell champions, and that he thinks that I and others of the PRM persuasion oppose.

There is, to be sure, an important class of cases in which the injunction might be denied. Those cases involve certain complex arrangements, such as computer programs that contain thousands of separate components that could each be covered by a separate patent. In those cases of fragmented ownership, any inadvertent infringement might well tip the balance against the automatic injunction, given the huge dislocations that arise from shutting down an entire system for a modest infringement. But that situation would receive the same treatment in land cases. If a builder assembled hundreds of plots to build a major project only to discover that he had not taken title from the proper owner of one postage-stamp plot, I doubt very much that any court would order the entire development to be torn down. Large damages might be award-

ed, but the business would go on. Once again there are, on this score, parallels between the two systems.

What is most ironic about Professor Menell's article is that, apart from constantly repeating that real property paradigms do not work for intellectual property, he offers no principled account of when injunctions should be issued in patent infringement cases. He does note that some of the subsequent decisions have been a bit more cautious about injunctions, but he offers no normative account as to why this is a good thing. To be sure, in some cases the injunction should be denied, as when the plaintiff has unreasonably delayed the request for an injunction in the first place. Professor Menell does not, however, discuss those cases that continue to issue injunctions when the patent holder is likely to suffer a substantial decline in market share in an expanding market, which makes it hard to recoup its business thereafter. Nor does he comment on the significance, if any, of the fact that the infringer had been unable to obtain a license from a patentee, or that the patentee was prepared to issue one if the proper amount of consideration was supplied.

In looking over cases of garden-variety infringement, it is hard to escape the conclusion that the entire system would be far better off by returning to the rule adopted in the Federal Circuit, based on earlier Supreme Court precedents, that offered full protection in three critical cases: when the patentee is practicing (i.e., using) the patent; when the patentee is licensing the patent to others; and when the patentee is not

using the particular patent because the patentee has chosen to develop an alternative product subject to patent protection. The third case is critical, for example, with chemical patents granted in forms that give the patentee use of multiple compounds within a single class of drugs. The entire system would fall apart if the patentee could not protect those forms that he did not commercialize, a position that the law recognizes.

All in all, a utilitarian should be dismayed by Professor Menell's defense of the discretionary rule on injunctive relief for deliberate, major, and unjustified infringement of property rights. We can only hope (but not confidently) that the Supreme Court's fashionable blunder in *MercExchange* will slowly be cut back with time. Quite simply, in most routine commercial transactions and in most litigation, the exceptions, qualifications, and privileges are of little consequence. What really matters is that we develop a system of secure property rights that allows people to transact at low cost and high reliability. Years ago, David Hume, one of the glorious founders of the modern utilitarian tradition, stressed the importance of the security of expectations in voluntary transactions. Nothing that Professor Menell has written about the fine points of patent law should ever make us abandon the cardinal truth that injunctive relief is appropriate in the vast number of tangible or intellectual property cases that come before the courts today. This is no absolutist view of the world. It is a bit of common sense that has guided courts for centuries in both domains. **R**



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