Cornell Law Library
Scholarship@Cornell Law: A Digital Repository

Cornell Law Faculty Publications | Faculty Scholarship

9-1-2013

The Right Not to Use in Property and Patent Law

Oskar Liivak
Cornell Law School, ol10@cornell.edu

Eduardo M. Peñalver
emp3@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/facpub

Part of the Intellectual Property Commons

Recommended Citation
Liivak, Oskar and Peñalver, Eduardo M., "The Right Not to Use in Property and Patent Law" (2013). *Cornell Law Faculty Publications.* Paper 639.
http://scholarship.law.cornell.edu/facpub/639

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE RIGHT NOT TO USE IN PROPERTY AND PATENT LAW

Oskar Liivak† & Eduardo M. Peñalver††

In Continental Paper Bag Co. v. Eastern Paper Bag Co., *the Supreme Court held (1) that patent owners have an absolute right not to practice their patent and (2) that even these nonpracticing patent owners are entitled to the liberal use of injunctive relief against infringers. Both of these holdings have been very important to the viability of patent assertion entities, the so-called patent trolls. In* eBay Inc. v. MercExchange, L.L.C., *the Supreme Court softened the injunction rule. In this Article, we argue that Congress or the Court should reconsider* Continental Paper Bag*'s embrace of an absolute right not to use, not because patents are not property but because the considerations at work within both property and patent law do not support recognizing such an unbounded right not to use. The Court's endorsement of a robust right not to use patents was based on an overly simplistic analogy to tangible property, which the Court characterized as recognizing "the privilege of any owner of property to use or not use it, without question of motive."*[1] *The Court's reasoning was flawed in two respects. First, the law of tangible property distinguishes among nonusers, penalizing owners whose nonuse interferes with other owners' use of their own property or induces others to waste time or effort appropriating the unused property. With respect to these derelict nonusers, the law employs numerous doctrines, such as nuisance, undue hardship, estoppel, abandonment, adverse possession, and permissive waste, to ensure that owners' decision not to use their property does not inflict harm on others. Second, the Court in* Continental Paper Bag *failed to consider the ways in which the reasons for recognizing a right not to use might differ in the contexts of patent and tangible property. Although the same basic considerations are potentially at play in both contexts—efficiency, autonomy, and personhood—the implications of nonuse differ in the patent context because of information's nonrivalrous nature and because of the particularly powerful way that patent law constrains the freedom of nonowners. Taking these factors into account suggests that the first-order normative case for recognizing a robust right not to use a patent is weaker than in the domain of tangible property. This is especially true when nonusing owners attempt to enforce their patents against independent inven-*

---

† Associate Professor of Law, Cornell University Law School.

†† John P. Wilson Professor, University of Chicago Law School. Research for this article was supported in part by the Roger Levin Faculty Fund at the University of Chicago. The authors are grateful to Larissa Katz, Marshall Phelps, Jeff Rachlinski, and Lior Strahilevitz for helpful comments and suggestions, and to participants in faculty workshops at George Washington, Tulane, and Cornell law schools.

1 Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 429 (1908).

tors. As a consequence, in cases brought against independent inventors, we suggest making patent remedies contingent on a patent owner's efforts to disseminate their inventions. Recognition of such an obligation to use in patents would significantly reduce the threats posed by patent trolls and the high-tech patent wars.

INTRODUCTION 1438
I. PATENT ASSERTION, INDEPENDENT INVENTION, AND THE RIGHT NOT TO USE 1444
A. *Continental Paper Bag Co. v. Eastern Paper Bag* 1445
B. Patent Trolls, Licensing the Invention, and Licensing the Patent 1447
II. THE RIGHT NOT TO USE IN THE LAW OF TANGIBLE PROPERTY 1453
A. The Right Not to Use and the Right to Exclude 1453
B. The Right Not to Use 1455
C. Normative Justifications for the Right Not to Use 1465
1. *Autonomy and Personhood* 1466
2. *Efficiency* 1467
III. THE RIGHT NOT TO USE IN PATENT 1468
A. Justifying Patent Nonuse According to Tangible Property Nonuse 1469
1. *Autonomy* 1469
2. *Personhood* 1470
3. *Efficiency* 1472
B. Conclusions: The Weakness of the Normative Case for Recognizing a Right Not to Use in Patent 1479
IV. PREVENTING THE HARMFUL NONUSE OF PATENTS 1481
A. Injunctions 1483
B. Damages 1487
C. Patent Misuse and Patent Nonuse 1492
CONCLUSION 1492

INTRODUCTION

In recent years, media discussions have increasingly cast patents and patent litigation in a negative light.[2] This represents a dramatic shift from the past, when commentators tended to contrast a relatively uncontroversial patent system with the uncertainty and conflict surrounding copyright and trademark in the digital age.[3] More often

---

[2] *See, e.g.*, Charles Duhigg & Steve Lohr, *The Patent, Used as a Sword*, N.Y. TIMES, Oct. 8, 2012, at A1 (describing a software company's costly struggle against a rival company's broad patent assertion).

[3] *See, e.g.*, Burton T. Ong, *Patenting the Biological Bounty: Re-Examining the Status of Organic Inventions as Patentable Subject Matter*, 8 MARQ. INTELL. PROP. L. REV. 1, 38 (2004) ("In contrast to the ideological imbroglios that occupy the academic landscapes of copy-

than not, these negative media discussions of patents have featured the curious character of the patent troll.

In *eBay v. MercExchange*, Justice Kennedy earnestly asked, "[I]s the troll the scary thing under the bridge, or is it a fishing technique?"[4] In that case, eBay had been found to have infringed MercExchange's valid U.S. patent and was trying to fend off a permanent injunction.[5] Such an injunction would have shut down or forced modification of at least part of eBay's operations unless eBay managed to pay MercExchange what was sure to be an enormous sum to settle the lawsuit.[6] In a last-ditch effort to extricate itself from that bind, eBay asked the Supreme Court to lift the threat of the injunction.[7] There was no doubt, as eBay's lawyer put it, that "[f]or my clients, [a patent troll has] been the scary thing under the bridge."[8] And this has been the sentiment of many recent patent defendants. They have described trolls, perhaps less tendentiously referred to as patent assertion entities,[9] as engaging in "[e]xtortion, pure and simple."[10] Perhaps motivated by a concern with the potential of injunctive relief to facilitate such extortion, the Court in *eBay* significantly softened the presumption in favor of granting injunctions upon a showing of patent infringement.[11]

Mark Lemley has called patent assertion "[t]he most significant problem facing the patent system today."[12] Solutions have been slow to materialize. First, many commentators are not convinced there is a problem at all.[13] For them, patent assertion is consistent with the very

---

right and trademark law, patent law has not been a popular battleground for intellectual property theorists.").

4 Transcript of Oral Argument at 26, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (No. 05-130).

5 *eBay*, 547 U.S. at 390–91.

6 Rather infamously, Research in Motion was forced to settle a similar lawsuit for $612.5 million against NTP, a patent assertion entity. Mike Musgrove, *For NTP, Battle Worth Fighting Ends in Vindication over Patent*, WASH. POST, Mar. 4, 2006, at D1.

7 *eBay*, 547 U.S. at 390–91.

8 Transcript of Oral Argument, *supra* note 4, at 26.

9 Patent assertion is defined for this Article as the "assert[ion of] patents against successful companies that independently develop and manufacture technology without knowledge of those patents" and without the "manufacture [of] products or transfer [of] technology" by the patent owner. Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1526 (2007).

10 Colleen Chien, *Startups and Patent Trolls* 14 (Santa Clara Univ. Sch. of Law Legal Studies Research Papers Series, Accepted Paper No. 09-12, 2012) (internal quotation marks omitted), *available at* http://ssrn.com/abstract=2146251.

11 *See eBay*, 547 U.S. at 394.

12 Lemley, *supra* note 9, at 1526.

13 *See, e.g.*, David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System* 10 (Chicago-Kent Coll. of Law, Research Paper No. 2012-03, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117421 ("By creating options to generate rewards for innovators otherwise shutout of the marketplace . . . NPEs may play a valuable role.").

purpose of the patent system—the revenue generated from this practice is seen as part of the incentive structure that patents are designed to create.[14] The commentators see attacks on patent trolls not only as misguided but also as likely to undermine the purpose of the whole system.[15]

Even among those who do perceive problems with patent assertion, there is no consensus about how to respond. Though a few scholars have proposed outright abandonment of the patent system,[16] most try to thread the needle by designing reforms that will dampen or prevent the harms of patent assertion without disrupting the rest of patent law.[17] Achieving this balanced goal has been challenging in large part because the contextual sensitivity it demands appears incompatible with a patent system that tends to operate in rather absolute terms.

Those who want to defend absolutist approaches to patent rights often do so by invoking an analogy between patent rights and tangible property.[18] Property looms large in our civic imagination, and it is hard to overestimate the rhetorical force of the analogy. The comparison of property and patents has tended to correspond with patent

---

14 *Id.*

15 *See id.* at 8, 10–11.

16 *See generally* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 11 (2008) (arguing that intellectual property is an "unnecessary evil" "[b]ecause there is no evidence that intellectual monopoly achieves the desired purpose of increasing innovation and creation").

17 To combat patent assertion, many commentators have focused on the issue of bad patents. Bad patents are those that are either too broadly claimed or too vaguely defined or that cover obvious inventions. These bad patents, the argument goes, are especially dangerous in the hands of patent trolls. *See* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE 6–11 (2008). In addition to breadth, many commentators also worry about the sheer number of patents granted, a flood that threatens our information economy with the specter of ever-increasing patent assertion. *See, e.g.*, MICHAEL HELLER, THE GRIDLOCK ECONOMY 58–78 (2008); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998). Though these issues are certainly important parts of the patent troll story, the problems with patents go deeper than overly liberal examination at the Patent and Trademark Office. There is evidence, for example, that patent assertion entities are not just focusing on bad patents. In a recent survey, Michael Risch showed that many patents that are asserted are, by all accounts, good patents whose validity is hard to impugn. *See* Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 478–84 (2012). This suggests that the problems with patents may well be deeper and more structural.

18 *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 424 (1908) ("The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention."(quoting United States v. Am. Bell Tel. Co., 167 U.S. 224, 250 (1897) (internal quotation marks omitted)); *see also* Roger Milgrim, *An Independent Invention Defense to Patent Infringement: The Academy Talking to Itself: Should Anyone Listen?*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 295, 305 n.44 (2008) (proposing a solution to patent infringement by analogizing between patent rights and real property rights).

absolutism and with efforts to discredit patent reform.[19] With the property analogy in hand, opponents portray proposed patent reforms as inconsistent with the sanctity of private ownership.[20]

The tendency to make a quick move from a comparison between property and patent law to the conclusion that patents must be absolute is exemplified in the Supreme Court's 1908 case of *Continental Paper Bag Co. v. Eastern Paper Bag Co.*[21] In that case, the Court held, among other things, that—just as with the owners of tangible property—patent owners enjoy an unlimited right not to use their patents.[22] The Court stated that "patents are property, and entitled to the same rights and sanctions as other property."[23] Because the invention is the inventor's "absolute property," the inventor "may withhold a knowledge of it from the public."[24] Armed with this kind of rhetoric, patent law has developed rigid views of infringement and, importantly for this Article, remedies. To remedy infringement, courts have granted injunctions as a "general rule"[25] and damages for all but the

---

19 *See, e.g.*, Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 1009–11 (2007) (criticizing as mistaken "the historical assumption that patents and other intellectual property rights are being 'propertized' today. The expansion in patent rights today is in accord with the similarly expansive development in patent rights under the guiding influence of natural rights philosophy in the early nineteenth century.").

20 *See* F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 703 (2001) (arguing that failure to appreciate patents as property and to protect patents with property rules will frustrate the purpose of the patent system); *cf.* Milgrim, *supra* note 18, at 303 (defending the current patent system by invoking the Founding Fathers' conception of patents).

21 210 U.S. 405 (1908). Though *Continental Paper Bag* is the most prominent case discussing the connection between patent and property, the substantive use of the analogy to decide cases existed long before 1908. *See, e.g.*, Wilson v. Rousseau, 45 U.S. (4 How.) 646, 673–74, 676 (1846) (allowing the executor of a deceased patentee a patent extension because "[t]he law has thus impressed upon [a patent] all the qualities and characteristics of property, for the specified period; and has enabled him to hold and deal with it the same as in case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate, to his [l]egal representatives, and becomes part of the assets"). Similarly, *Continental Paper Bag* was not the last such case from the Supreme Court. In *Special Equipment Co. v. Coe*, the Supreme Court cited to *Continental Paper Bag* with approval, stating that "[t]his Court has consistently held that failure . . . to make use of a patented invention does not affect the validity of the patent." 324 U.S. 370, 378–79 (1945). But in contrast to the dissent by Justice Harlan in *Continental Paper Bag*, Justice Douglas's dissent, joined by Justices Black and Murphy, urged that "it is time to be rid of [the rule from *Continental Paper Bag*]. It is inconsistent with the Constitution and the patent legislation which Congress has enacted." *Id.* at 381 (Douglas, J., dissenting).

22 *See Cont'l Paper Bag Co.*, 210 U.S. at 423–24.

23 *Id.* at 425.

24 *Id.* at 424 (quoting United States v. Am. Bell Tel. Co., 167 U.S. 224, 250 (1897)).

25 *See* HERBERT F. SCHWARTZ & ROBERT J. GOLDMAN, PATENT LAW AND PRACTICE 223 (7th ed. 2011) (summarizing the state of patent law just prior to the Supreme Court's decision in *eBay*).

most remote consequences of infringement.[26] Recently, the Supreme Court has weakened the presumption that injunctions should always issue against patent infringers,[27] but absolutist impulses remain, especially within the law of patent damages.[28]

The patent assertion business model is greatly enhanced by a robust right not to use. *Continental Paper Bag* granted patent holders that right, and it used the analogy with property to justify it.[29] By granting patent owners an absolute right not to use—with no obligation either to manufacture the invention or license the invention to those who could[30]—*Continental Paper Bag* enabled entities to engage in naked patent assertion without being encumbered by the harder and riskier task of actually attempting to deliver the useful invention to the public.[31]

Because of the association between the property analogy and patent absolutism, many commentators have tried to resist absolutist conceptions of patent rights by arguing against comparing patents with property.[32] A lively debate has ensued over whether patents are property.[33] This Article cannot hope to settle that dispute once and for all. Instead, our goal is substantially more modest: to show that, contrary

---

26 *See id.* at 239 n.111 (citing Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1544–47 (Fed. Cir. 1995)) (giving examples of but-for consequences of infringement that are too remote for compensation, including "an inventor's heart attack and a patent-owning corporation's loss of value in its common stock").

27 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–92 (2006).

28 *See Rite-Hite*, 56 F.3d at 1544–47.

29 *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 429 (1908) ("[I]t is the privilege of any owner of property to use or not use [one's property], without question of motive." (citing Connolly v. Union Sewer Pipe Co., 184 U.S. 546 (1902)).

30 For a discussion of the distinction between licensing the patent and licensing the invention, see *infra* notes 62–77 and accompanying text. *See also* Oskar Liivak, *Establishing an Island of Patent Sanity* 14–15 (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 13-06, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205996 (distinguishing between two critically different types of patent-related licensing: licensing that mediates exchange of the invention and licensing that mediates exchange of only a naked promise not to sue).

31 *See* 210 U.S. at 422–30; *see also* Liivak, *supra* note 30, at 15 (noting the increased investments to acquire patents rather than engage in invention).

32 *See, e.g.*, Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1071–72 (2005) (weighing the pros and cons of treating intellectual property through tort law instead of the property paradigm); *infra* notes 103–08 and accompanying text.

33 *See generally* Peter S. Menell, *Intellectual Property and the Property Rights Movement*, 30 REGULATION 36, 38 (2007) (arguing that tangible property and intellectual property "derive from different philosophical foundations"); Richard A. Epstein, Response, *The Property Rights Movement and Intellectual Property*, 30 REGULATION 58 (2008) (responding directly to Menell and arguing that parity exists between tangible and intellectual property); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 113 (1990) (noting various congruencies between traditional property and intellectual property); Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715, 715 (1993) (arguing that the analogy to real property is not particularly important).

to *Continental Paper Bag*, exploring the connections between patent and property law does not lend itself to an unqualified right not to use within patent law. To the contrary, the limits on nonuse at work within property law may actually help patent lawyers identify sound strategies for combatting the harmful nonuse represented by patent trolls.

Though the law of tangible property does recognize owners as possessing a right not to use property, that right is not without constraints. Within the law of tangible property, a number of doctrines hem in the right not to use and are aimed at ensuring that an owner's nonuse of her property does not harm others, particularly by interfering with those others' ability to use and enjoy their own property or by inducing them to waste time or effort appropriating the unused property.[34] Where the right not to use is recognized by tangible property law, there are strong, overlapping normative justifications for it that are ultimately rooted in tangible property's rivalrous consumption and are therefore not obviously relevant to patent owners.[35] Far from suggesting that the right not to use a patent should be absolute, taking seriously the notion that patents are property supports a far more qualified right not to use than the nearly absolute one endorsed by *Continental Paper Bag*. For reasons we will discuss, the case against a right not to use in patent is particularly strong when nonusing owners invoke patents against independent inventors. Consequently, we will argue, unless the holder of the patent is actually practicing the invention, remedies for patent infringement against independent inventors should be significantly softer than they would be in other successful patent infringement actions, possibly even de minimis.

Although in this Article we keep our focus narrowly fixed on the right not to use and its role in facilitating patent assertion, we do not want to ignore the larger patent-property debate. In undertaking this exploration of the right not to use, we hope to make a broader point as well. We think that it is possible for patent law to learn important and valuable lessons by engaging in a serious and informed way with the law of tangible property. Rather than necessarily weighing in favor of inflexible and absolute patent rights, a sophisticated view of patents as property and a proper use of the analogy between patent and property can be powerful tools in support of patent reform.

---

34 *See infra* Part II.

35 *See, e.g.*, ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 2 (6th ed. 2012).

I
Patent Assertion, Independent Invention, and the Right Not to Use

In discussing the right not to use intellectual property, our focus will be on the law of patents. There are several reasons for this: First, some areas of intellectual property are very forthright about refusing to recognize a right not to use. Most obviously, trademark law requires continuous use to avoid having the trademark fall back into the public domain.[36] Similarly, in some states, publicity rights are deemed to terminate at the death of the celebrity if they are not actively exploited during the celebrity's lifetime.[37] Second, the importance of nonuse is lessened where the exclusion right conferred by intellectual property law is less robust. In copyright, for example, independent creation is protected against infringement actions,[38] and so the owner's nonuse of the copyrighted material has fewer consequences for the freedom of other creators than if the material were patented.[39] Copyright goes beyond this protection of independent invention and excuses some copying of parts of the copyrighted work through the doctrine of fair use.[40]

In contrast, patent law—at least under *Continental Paper Bag*—recognizes an unqualified right not to use[41] and combines that protection with other features that enhance the constraints and costs nonuse imposes on nonowners. Unlike copyright, patent does not protect independent inventors from infringement liability.[42] So, unlike copy-

---

36 Trademark abandonment occurs "[w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment." 15 U.S.C. § 1127 (2012).

37 1 Anne Gilson Lalonde & Jerome Gilson, Gilson on Trademarks § 2B.04(3) (Karin Green ed., rev. 82d ed. 2012) (describing a "minority view" with "trademark overtones" where the right of publicity "is inheritable only if the name and likeness of the individual were commercially exploited during the individual's lifetime. If they were not, the right dies with the individual").

38 *See* 3-12 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.11(D)(1) (2012).

39 *But see generally* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. Cal. L. Rev. (forthcoming May 2013) (describing some of the features of copyright law that facilitate the operation of "copyright trolls").

40 *See* 17 U.S.C. § 107 (2006 & Supp. V 2011).

41 *See* 210 U.S. 405, 429 (1908).

42 *See* Merges et al., *supra* note 35, at 29–30; Stephen M. Maurer & Suzanne Scotchmer, *The Independent Invention Defence in Intellectual Property*, 69 Economica 535, 535 (2002). *Compare* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (holding that the originality requirement of copyright requires "only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity") *with* Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 23, 29–30 (1997) (finding infringement under the doctrine of equivalents even though the patent infringer did not learn of the patent until after it had begun manufacturing the patented product).

right, not only can an owner choose not to use the invention, the owner can also sue to prevent others from using it (or its equivalents), even if they (re)discover the invention on their own.[43] Moreover, unlike copyright, patent lacks a doctrine of fair use.[44] And other potential safeguards in patent law, like a research use exemption,[45] have been interpreted so narrowly that they are practically nonexistent.[46] For these reasons, the stakes regarding the right not to use are higher for patent than for other sorts of intellectual property. In discussing the right not to use in patent, however, many of the normative considerations at work will be equally applicable to other forms of intellectual property.

A. *Continental Paper Bag Co. v. Eastern Paper Bag*

The *Continental Paper Bag* case grew out of a classic example of patent suppression. Both the Continental Paper Bag Company and the Eastern Paper Bag Company manufactured, not surprisingly, paper bags.[47] The machines that could efficiently form the bags were central to their manufacturing efforts.[48] The Eastern Paper Bag Company purchased a patent on an improved machine, but it did not use that machine or license anyone else to do so.[49] It perceived the patented invention to constitute a superior method of manufacturing bags, one that (if practiced by a competitor) might cut into its profits.[50] By purchasing the patent and suppressing the invention, it hoped to protect the costs it had sunk into developing the machines it was already using.[51]

Continental started using a machine that arguably infringed Eastern's patent on the improved machine.[52] The trial court found that Eastern Paper Bag's patent was valid and that Continental's machine

---

43 *See Warner-Jenkinson*, 520 U.S. at 23, 29–30; Maurer & Scotchmer, *supra* note 42, at 535.

44 Though proposals have been made that it should have one. *See generally* Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177 (2000) (arguing that patent law should adopt a doctrine of fair use similar to that of copyright to address market failures currently arising under the patent system).

45 *See generally* Ronald D. Hantman, *Experimental Use as an Exception to Patent Infringement*, 67 J. PAT. & TRADEMARK OFF. SOC'Y 617, 619–20 (1985) (explaining the origins of the research use exception in Justice Story's opinion in *Whittemore v. Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) (No. 17,600), and subsequent history of the exception).

46 *See* Madey v. Duke Univ., 307 F.3d 1351, 1360–63 (Fed. Cir. 2002) (articulating that only a "very narrow form" of the experimental use defense persists).

47 Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 406, 427–28 (1908).

48 *See id.* at 406, 428–29.

49 *Id.* at 407, 427–28.

50 *Id.* at 428–29 (citing Cont'l Paper Bag Co. v. E. Paper Bag Co., 150 F. 741, 744 (1st Cir. 1906) (Aldrich, J., dissenting)).

51 *Id.*

52 *See id.* at 416.

infringed it.[53] It granted Eastern Paper Bag injunctive relief.[54] The Supreme Court affirmed the injunction against Continental, despite the fact that Eastern had no intention either to use or license the claimed invention.[55] Without a reasonable explanation for the nonuse (e.g., lack of means to use the technology), the dissenting circuit judge had concluded that Eastern was just protecting its sunk costs and was suppressing the invention to avoid the possibility that the resulting competition would render those older machines obsolete.[56] "[G]ranting all this," the Supreme Court still sided with Eastern.[57] In reaching its conclusion, the Court made two related points. First, the Court held that "patents are property, and entitled to the same rights and sanctions as other property."[58] The Court then went further, stating that, because an invention is the "absolute property" of the inventor, "[h]e may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him."[59] Those benefits included the right not to practice the patent.

The Court reasoned that exclusion in this case was "the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive."[60] A patent holder's "title is exclusive, and so clearly within the constitutional provisions in respect to private property that he is neither bound to use his discovery himself or permit others to use it."[61] In other words, patents are property, and the law does not obligate owners to use their property. Therefore, the owners of patents, like the owners of any other kind of property, have no obligation to use or license the underlying invention.

---

53 *Id.* at 407, 416.

54 *Id.* at 407.

55 *Id.* at 429–30.

56 *Cont'l Paper Bag Co.*, 150 F. at 744 (Aldrich, J., dissenting) ("There is no pretense in this case that equitable aid is asked to protect from infringement the patent the plaintiff is using in its business. In the aspect most favorable to the plaintiff, the relief sought is injunction protection to a business or an industry built up in using a particular invention, and through acquiring and holding in deliberate nonuse a competing invention by way of protection.").

57 *Cont'l Paper Bag Co.*, 210 U.S. at 428–30.

58 *Id.* at 425.

59 *Id.* at 424.

60 *Id.* at 429.

61 *Id.* at 425 (quoting Bement v. Nat'l Harrow Co., 186 U.S. 70, 90 (1902)).

B. Patent Trolls, Licensing the Invention, and Licensing the Patent

Although the patent troll phenomenon has led some commentators to criticize the patent system as a whole,[62] patent assertion entities rely on a particular type of transaction. A patent is granted to an inventor who has developed a new, nonobvious invention.[63] In layman's terms, the nonobvious invention is a completed solution to some technical problem,[64] a solution that the public does not yet have[65] and that it cannot very easily develop.[66] Once issued, the patent grants the inventor the exclusive rights to decide who "makes, uses, offers to sell, . . . sells, . . . or imports . . . [the] patented invention."[67] Those rights enable inventors to engage in two types of transactions: ex ante and ex post.[68] For ex ante transactions, the inventor, or the inventor's assignees, approaches potential users of the patented invention and offers the invention to them.[69] If the invention is useful and the parties can find mutually agreeable terms, the inventor transfers the invention to the user along with a license to the patent's exclusive rights. In an ex ante transaction, the contract transfers useful technology from the inventor (or the assignee) to a user.[70] These transactions, better described as licensing of the invention, are not the focus of patent assertion entities.

The other type, ex post transactions, are different. They transfer only a promise not to sue with no transfer of the invention.[71] In these transactions, negotiation is between the patent holder and an infringer who has already gained access to the patented invention. Importantly, American patent law does not distinguish between

---

62 *See, e.g.*, Michele Boldrin & David K. Levine, *The Case Against Patents* 1 (Fed. Reserve Bank of St. Louis, Working Paper No. 2012-035A, 2012), *available at* http://research.stlouisfed.org/wp/2012/2012-035.pdf (arguing that the measurable benefits of the patent system are outweighed by its economic costs).

63 35 U.S.C. §§ 101–103, 112 (2006 & Supp. V 2011).

64 35 U.S.C. §§ 101, 112 (2006 & Supp. V 2011); *see also* Oskar Liivak, *Rescuing the Invention from the Cult of the Claim*, 42 SETON HALL L. REV. 1, 16–17 (2012) (discussing the purpose and interplay between 35 U.S.C. §§ 101 and 112).

65 35 U.S.C. § 102 (2006 & Supp. V 2011).

66 35 U.S.C. § 103 (2006 & Supp. V 2011).

67 35 U.S.C. § 271(a) (2006).

68 *See* FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 7–8, 31–72 (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

69 *See id.* at 31–48.

70 *See id. See generally* Liivak, *supra* note 30; Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH L.J. 1477, 1499 (2005); Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001) (drawing a conceptual picture of a "normal" market transaction where goods are exchanged and where the legal rights that protect those goods automatically move with the goods).

71 *See* FED. TRADE COMM'N, *supra* note 68, at 49–72.

independent inventors and copyists.[72] As a result, even when someone obtains access to the invention by independently inventing it without knowledge of the patent's existence, a patent holder can still sue for infringement.[73] Indeed, as we will discuss at greater length below, it is the liability of independent inventors for patent infringement that makes ex post transactions potentially very lucrative for patent trolls.[74] With these ex post transactions, there is no transfer of the technology itself, as the licensee is already actively using the invention. The ex post transaction transfers only a bare promise not to sue. This is a "license" of the patent, but it is fundamentally different from licensing the *invention*.[75] This ex post type of transaction is the principal focus of the patent assertion business model.[76]

The user in an ex post transaction does not get any useful technology. She just gets relief from a legal threat. If the infringement is willful and the infringer copied from the original inventor, this kind of ex post transaction constitutes an important part of the patent owner's legal protection, and it seems legitimate. But where an independent inventor inadvertently infringes a patent, the tactic looks and feels to many like a shakedown.[77] This is especially true where the patent owner is not otherwise using the patent or actively seeking to license the invention. And the tactic is most troubling of all where the owner consciously chooses to wait for the infringement to mature in order to extract maximum leverage from the inadvertent infringer.

Two features of patent law are particularly important to the possibility of naked, ex post patent assertion as a viable profit-seeking activ-

---

72 *See* MERGES ET AL., *supra* note 35, at 29; Maurer & Scotchmer, *supra* note 42, at 535.

73 *See* MERGES ET AL., *supra* note 35, at 29; *see, e.g.*, Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 23, 29–30 (1997).

74 The ability to sue independent inventors is highly controversial. *See infra* note 92 and accompanying text. And, though it is outside the scope of this Article, that ability may be necessary to protect the inventor's exclusive position for *ex ante transactions*. In other words, when focusing only on ex ante transactions, the patent system and its exclusive rights can be seen as protecting the inventor's position as the sole and exclusive supplier of the invention to the public. To maintain that position, and to avoid redundant expenditures of research and development, it may make sense for the patent system to recognize a right to sue independent inventors (especially where the second arriving independent inventor intends to distribute the invention itself) *as long as the patent holder is actually making efforts to disseminate the invention itself.*

75 For this reason, care should be taken in clearly distinguishing licensing of the invention from licensing of the patent. Unfortunately, patent law has generally blurred any distinction between the invention and the legal rights granted by a patent. In patent discussions, licensing of the invention is used synonymously with licensing of the patent. This is not to say that, in practice, the two categories are always easy to distinguish from one another. But the conceptual distinction remains an important one to keep in mind.

76 *See* John M. Golden, Commentary, *"Patent Trolls" and Patent Remedies*, 85 TEX. L. REV. 2111, 2111–12 (2007).

77 *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2008–09 (2007).

ity. First, as we just observed, patent infringement does not require copying by the defendant. For infringement, the law simply asks whether the defendant is making, using, or selling the claimed invention.[78] As stated by the Supreme Court, "intent [of the defendant] plays no role" in infringement.[79] And indeed, plaintiffs rarely allege that copying is intentional in patent infringement lawsuits.[80] Often, as technological opportunities emerge, many people independently invent the same (or nearly the same) invention at nearly the same time. Examples of such simultaneous invention are quite easy to find.[81] Leibniz and Newton famously invented calculus independently of one another at around the same time.[82] Sawyer, Man, Swan, and Edison were all working toward incandescent light bulbs at the same time.[83] And Alexander Graham Bell and Elisha Gray were working toward the telephone at the same time.[84] Yet, the patent system grants only one inventor the patent over the invention.[85] When any other inventors make or use the invention, they are infringing the patent, even though they came up with the invention on their own and did not copy or rely on the work of the patent holder.

The second critical feature for patent assertion is the fact that, under *Continental Paper Bag*, the patent holder is under no obligation to practice the invention.[86] A patent holder is not required to manufacture the invention or even to plan to do so. Nor does the patent holder need to license anyone else to manufacture the invention.[87] The patent holder can quietly, and relatively cheaply, sit on the patent and wait for others to infringe it. Though many patent holders do

---

78 35 U.S.C. § 271(a) (2006).

79 Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 36 (1997).

80 Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. Rev. 1421, 1443 (2009) (reporting that only 10.9% of patent complaints examined in the study alleged copying). Though not necessary for infringement allegations, copying can be quite significant for the award of treble damages for willful infringement. *See, e.g.*, 35 U.S.C. § 284 (2006 & Supp. V 2011); In re Seagate Tech., LLC, 497 F.3d 1360, 1368 (Fed. Cir. 2007).

81 *See* D. Lamb & S.M. Easton, Multiple Discovery xi–xii (1984) (listing numerous instances of near simultaneous invention including: the jet engine, electric light, phonograph, color photography, kinetic theory of gases, analytic geometry, infinitesimal calculus, and quantum mechanics).

82 For a thorough account of the story, see generally A. Rupert Hall, Philosophers at War (1980).

83 *See* Arthur A. Bright, Jr., The Electric-Lamp Industry 50–56 (1949).

84 *See* Edwin S. Grosvenor & Morgan Wesson, Alexander Graham Bell 45–49 (1997); Lamb & Easton, *supra* note 81, at 80–85.

85 *See* Maurer & Scotchmer, *supra* note 42, at 535, 541.

86 *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 429–30 (1908).

87 *See* 35 U.S.C. § 271(d) (2006); *see also* F. Scott Kieff et al., Principles of Patent Law 1048 (5th ed. 2011) (citing *Continental Paper Bag* to support the proposition that failure to license would be protected even absent 35 U.S.C. § 271(d)).

practice their inventions, they are under no obligation to do so in order to enforce their patents according to *Continental Paper Bag*.

Together these two features of patent law combine to enable patent assertion. In fact, the practice is extremely lucrative.[88] Simply asserting patents is arguably easier and more profitable than the risky undertaking of inventing and commercializing technology. In a survey, one entrepreneur depressingly noted that in today's climate, it is "a no brainer"[89] to focus on patent assertion. "Investing in invention is for schmucks."[90] Though patent assertion entities do have their defenders,[91] it is hard to understand any functioning patent system where the necessary and challenging job of invention and commercialization takes the back seat to pursuing patents and infringement actions alone.

During the past few years, multiple scholars within the disciplines of both economics and law have actively questioned the wisdom of the first of these critical features—the patent liability of independent inventors.[92] These proposals have met with varying levels of criticism.[93] For example, prominent intellectual property lawyer Roger Milgrim

---

88 *See* Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 328–31 (2010) (discussing licensing revenue received by various patent assertion entities).

89 Chien, *supra* note 10, at 19–20 (quoting Nicholas White, Comment to Joff Wild, *Now That IP Is Mainstream, Let's Not Mess This Once in a Lifetime Opportunity Up*, INTELL. ASSET MGMT. (July 9, 2012, 2:14 PM), http://www.iam-magazine.com/blog/Detail.aspx?g=b0610bab-d371-4401-bd6f-6b12368b8eb0).

90 *Id.*

91 *See, e.g.*, James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 189–90 (2006) ("[P]atent trolls actually benefit society.").

92 *See* Manfredi La Manna et al., *The Case for Permissive Patents*, 33 EUR. ECON. REV. 1427, 1437 (1989) (advocating a "permissive" patent regime where the PTO would "accept[ ] all applications up to the date of the award of a patent to the earliest inventor of a given class of new products/processes"); Oskar Liivak, *Rethinking the Concept of Exclusion in Patent Law*, 98 GEO. L.J. 1643, 1652–53 (2010); Maurer & Scotchmer, *supra* note 42, at 535–36 ("[W]e discuss industrial environments in which the best rule is to allow a defence of independent invention."); Carl Shapiro, *Prior User Rights*, 96 AM. ECON. REV. 92, 95 (2006) (describing the "attractive properties" of granting independent inventors use rights); Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475, 479 (2006) (proposing to bestow "a defense to patent infringement on the independent inventor(s)"); John S. Liebovitz, Note, *Inventing a Nonexclusive Patent System*, 111 YALE L.J. 2251, 2279–81 (2002) (arguing for co-ownership of patent by independent inventors); *see also* Oskar Liivak, *Maintaining Competition in Copying: Narrowing the Scope of Gene Patents*, 41 U.C. DAVIS L. REV. 177, 223–24 (2007) (discussing independent invention in the narrower confines of patents claiming purified and isolated naturally occurring gene sequences).

93 S*ee, e.g.*, Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 812–13 (2002) (commenting on Scotchmer and Maurer's proposal: "[t]he limitations imposed by the model's assumptions suggest extreme caution in deriving any practical policy recommendations from it"); Lemley, *supra* note 9, 1526–32; Milgrim, *supra* note 18, 295–97 (suggesting that such academic proposals are in need of "adult supervision").

entitled one response to these proposals *An Independent Invention Defense to Patent Infringement: The Academy Talking to Itself: Should Anyone Listen?*[94] Milgrim argued that suggestions to protect independent inventors indicate a need for "adult supervision" of scholars and that such protection would threaten to "eviscerat[e]" a patent owners' right to exclude.[95] Milgrim drew heavily on the analogy to real property, noting how "valued . . . the protections for real property are in this country" and arguing that reforms, if needed, are better served by creative remedies rather than unilateral modification of the right to exclude.[96] The idea of a defense against patent infringement claims for independent inventors remains controversial.[97]

The possibility of discouraging patent assertion by introducing an obligation to practice inventions has received less attention. By definition, however, a patent assertion entity is not actively licensing or manufacturing the underlying invention to those that can utilize it prior to identifying potential acts of infringement. Instead, patent assertion entities merely seek infringers in order to demand money in exchange for the promise not to sue.[98] Their activity is facilitated by the lack of an obligation for patentees to manufacture, license, or otherwise disseminate their patented invention. Changing the law in a way that discourages nonuse would therefore make it more difficult to build a business around mere patent assertion. Importantly, this feature of patent law is not expressly spelled out in the patent statutes.[99] Yet, because of *Continental Paper Bag*,[100] the existence of the right has long been treated as a settled question within patent law. But the Court's willingness to reconsider in *eBay* what *Continental Paper Bag* had to say about the availability of injunctive relief suggests that the time may be ripe to do the same with nonuse.[101]

One way to challenge *Continental Paper Bag*'s holding with regard to the right not to use is to reject the Court's reliance on a facile analogy between patent and tangible property. Historically, both

---

94 Milgrim, *supra* note 18.

95 *Id.* at 296, 303. In addition, as a practical matter, a defense for independent inventors sits uncomfortably with patent law's novelty requirement. *See* Liivak, *Rethinking the Concept of Exclusion in Patent Law*, *supra* note 92, at 1680–84; *see also* Blair & Cotter, *supra* note 93, at 819 (pointing out problems with the independent discovery defense).

96 Milgrim, *supra* note 18, at 305 n.44, 307.

97 Though note that with the passage of the America Invents Act, U.S. patent law now has widely applicable prior user rights. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 5(a), 125 Stat. 297 (2011) (codified as amended at 35 U.S.C. § 273 (Supp. V 2011)); U.S. PATENT & TRADEMARK OFFICE, REPORT ON THE PRIOR USER RIGHTS DEFENSE 1–4, 7 (2012), *available at* http://www.uspto.gov/aia_implementation/20120113-pur_report.pdf.

98 *See* Liivak, *supra* note 30, at 14.

99 *See generally* 35 U.S.C. (2006 & Supp. V 2011) (setting forth federal patent law).

100 *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 429–30 (1908).

101 *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393–94 (2006).

courts and commentators have tended to use the comparison between patent rights and tangible property to promote absolutist conceptions of patent rights.[102] Consequently, many commentators interested in resisting absolutist conceptions of patent rights have argued against treating patents as property. Their argument has been that, properly distinguished from tangible property, patents would no longer operate under the spell of Blackstone's sole and despotic dominion.

Leading the charge against treating patents (and intellectual property generally) as property is Mark Lemley, who has argued that "treating intellectual property as 'just like' real property is a mistake as a practical matter."[103] In fact, his worries about the analogy between intellectual property and property run so deep that he suggests using the term "IP" instead of "intellectual property" in hopes that we might "forget" this problematic association.[104] We can perhaps do better, Lemley suggests, if we conceptualize "IP" as a "tort,"[105] as "a government-created subsidy,"[106] or as "government regulation."[107] He doubts that we "need an analogy at all" and posits that "[i]ntellectual property has come of age; it no longer needs to turn to some broader area of legal theory to seek legitimacy. The economics of intellectual property law should focus on the economic characteristics of intellectual property rights . . . ."[108]

On the other hand, some scholars, even some who agree with Lemley's push to soften protection of intellectual property, conclude, like Stewart Sterk, that "[i]t is far too late to expunge the rhetoric of property from dialogue about [intellectual property]."[109] John Duffy has stated, in response to Lemley, that

> intellectual property should be treated as a species of property. More is at stake here than mere semantics, for keeping intellectual property isolated impoverishes both intellectual property scholarship and more general property rights theories. A unified theory of property—one broad enough to account for the similarities *and differences* among species of property as diverse as Blackacre and pat-

---

102 *See, e.g.*, *Cont'l Paper Bag Co.*, 210 U.S. at 425 ("[I]t was decided that patents are property, and entitled to the same rights and sanctions as other property . . . ."); Mossoff, *supra* note 19, at 1009–11.

103 Lemley, *supra* note 32, at 1031–32.

104 *Id.* at 1075.

105 *Id.* at 1072.

106 *Id.*

107 *Id.* at 1073.

108 *Id.* at 1075.

109 Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 469 (2005). Professor Sterk focused particularly on copyright law, but his broader argument is equally applicable to other forms of intellectual property.

> ents—promises to increase rather than to diminish our understanding of property and intellectual property.[110]

We agree with Sterk and Duffy. The insights to be gleaned from a careful study of property law are powerful tools that we should not ignore.[111] And this embrace of the analogy does not entail an endorsement of patent absolutism. Indeed, unmoored from the complexity and qualification that have developed within the law of property over centuries of trial and error, patent theory might well be even more likely to move in ever more absolutist directions. Although he has been a forceful voice against the property analogy, Lemley has said that he continues to hold out some hope that "it might be possible to rehabilitate the property analogy"[112] to intellectual property. At least in part, the rest of this Article is an attempt to do exactly that.

II
The Right Not to Use in the Law of Tangible Property

As a descriptive matter, the Court's assertion in *Continental Paper Bag* about how the law of tangible property treats the right not to use vastly oversimplifies the situation. In this section, we will briefly discuss the law of tangible property as it relates to nonuse and explore some of the normative considerations that may help explain and justify why property law treats nonuse the way it does. We will later turn to the domain of intellectual property to see whether the law of nonuse within the law of tangible property has anything useful to contribute to the discussion of the nonuse in patent law.

A. The Right Not to Use and the Right to Exclude

Because of the controversy over patent trolls, the right not to use has received more attention in patent law circles than it has within the commentary on tangible property. This disregard of the right not to use in tangible property is probably due at least in part to a tendency to subsume the right not to use within the right to exclude, which has been the subject of a great deal of discussion among property scholars in recent years.[113] Although the right to exclude indirectly protects

---

110 John F. Duffy, Comment, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 Tex. L. Rev. 1077, 1078 (2005).

111 Others have also looked within traditional property law for limits on patents. *See* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 Duke L.J. 1, 106–27 (2004); Peter Lee, *The Accession Insight and Patent Infringement Remedies*, 110 Mich. L. Rev. 175, 202–20 (2011); Christopher M. Newman, *Patent Infringement as Nuisance*, 59 Cath. U. L. Rev. 61, 112–20 (2009).

112 Lemley, *supra* note 32, at 1069.

113 *See* Adam Mossoff, *The False Promise of the Right to Exclude*, 8 Econ J. Watch 255, 255–56 (2011).

use (and nonuse) rights, the two are conceptually distinct and the right to use is usually understood to be normatively more fundamental.[114] As James Penner has put it, "[n]o one has any interest in merely excluding others from things, for any reason or no reason at all. The interest that underpins the right to property is the interest we have in purposefully dealing with things."[115]

The distinction between the right not to use and the right to exclude is particularly clear with respect to land. We can easily imagine a situation in which landowners lack the discretion to determine the timing of some particular use or development of their land but retain a right to exclude, or in which they retain discretion over timing of use but enjoy only a very qualified right to exclude. In colonial North America, for example, local laws frequently obligated owners to actively and continuously use their land on the penalty of forfeiture.[116] Such an affirmative obligation to use the land, however, was perfectly consistent with those owners continuing to be able to exclude nonowners as long as the former retained ownership of the land. In contrast, owners of land in Sweden, and other parts of Scandinavia, have wide discretion to determine whether or when to develop their land. But they have very limited rights to exclude nonowners from their land except where their active use decisions require it, such as when exclusion from part of the property is necessary to prevent physical damage or to protect the privacy of occupied dwellings.[117]

Recognizing broad exclusion rights is one way of preventing others from undermining the right to control use or nonuse.[118] Where an item of property can only support one use, however, the right not to use (or the right to wait to use) converges as a practical matter with the right to exclude. In those situations, the two rights become largely interchangeable. Where more than one use is possible—as with land—the answer to the nonuse question has the potential to diverge from the owner's right to exclude and sometimes does, as in Swedish property law.

---

114 *See, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68–104 (1997); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 315 (2008); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012).

115 PENNER, *supra* note 114, at 70–71.

116 *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–63 (1996). Homesteaders seeking to take title under the Homestead Act were under a similar obligation to cultivate or improve their land even while enjoying whatever right to exclude they enjoyed by virtue of the law of trespass. *See* Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862).

117 *See* Kevin T. Colby, *Public Access to Private Land—Allemansrätt in Sweden*, 15 LANDSCAPING & URB. PLAN. 253, 254–55 (1988); *see also* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 4 (2012) (describing the allemansrätt).

118 *See* Smith, *supra* note 114, at 1693–94.

It is plausible, as Henry Smith has argued in numerous contexts, that there are sometimes second-order reasons (relating to such considerations as information and administrative costs) for affirming that owners have a presumptive right to exclude others (and thereby to prevent those others from making some use of an unused "thing") even where it would seem to be preferable (on some normative ground) to recognize a nonowner's right to use the property over an owner's objection.[119] Indeed, this is what property law seems to do in the many jurisdictions that, at least formally, are willing to enjoin trespass without requiring proof of harm by owners.[120] We will consider the relevance of such indirect reasons for protecting patent nonuse in Part III. Our immediate purpose, however, is simply to clarify the conceptual distinction between nonuse and exclusion, to describe the law of property as it relates narrowly to the right not to use, and to suggest some of the normative considerations that might explain the shape the law assumes.

B. The Right Not to Use

It is, strictly speaking, true to say (as the Court did in *Continental Paper Bag*)[121] that the law of tangible property permits owners to choose not to use their property. Left unqualified, however, this statement is extremely misleading because it ignores substantial limitations that the law of property imposes on owners' nonuse of tangible property. The law does not hesitate to penalize owners for nonuse where that nonuse harms third parties and, in particular, where it harms the interest that those parties have in use and possession of their own property. It is true that motive is by and large irrelevant in property law's treatment of nonuse. Both harmless and harmful nonuse can result from unsavory motives, such as spite or the desire to suppress competition, or from motives most would regard as praiseworthy, such as the desire to conserve a piece of land in its natural state. Although it does not inquire into motives, the law focuses a great deal of attention on the *manner* in which owners go about not using their tangible property to ensure that they do not harm others in the process.

Property law uses many disparate doctrines to accomplish this goal. A handful, however, seem particularly relevant to the ability of owners to decline to use their property. These are, among others, abandonment; undue hardship and estoppel as they relate to inno-

---

119 *See id.*; *see also* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1780 (2007) ("[T]he simplicity and information-hiding function of exclusion rights allow officials and other nonowners to interact with the owner in the simplest of ways.").

120 *See* Newman, *supra* note 111, at 67.

121 Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, at 424, 429–30 (1908).

cent improvers; nuisance; permissive waste; adverse possession; and necessity. As a practical matter, we will need to discuss these individual doctrines separately. But, in understanding the right not to use within tangible property law, it is important not to fixate narrowly on one particular doctrine or another. Nor are we describing these doctrines in order to argue for a one-to-one translation of each from the context of tangible property into patent law. Considered by itself, any particular doctrine can be more or less demanding of owners. From the standpoint of attempting to understand the owner's effective right not to use, however, we are interested in understanding the dimensions of the zone of discretion that remains in the wake of all of these doctrines working in concert and in isolating the common principles, if any, that lie behind them. Once we have described these doctrines in more detail, we will turn to the equally important question of why the law of tangible property might ever protect the power of owners to (attentively) not use their property.

ABANDONMENT

American property law does not permit owners to abandon ownership of land.[122] Although the law is often characterized as granting the owners of chattels the unilateral power to sever their ties of ownership to an item of personal property,[123] abandonment law operates in practice more like a variant of estoppel. That is, in conflicts between an owner and a subsequent possessor, an owner who is deemed to have abandoned a piece of property will not be able to recover possession of the abandoned property from the person who has appropriated it in the interim or from someone who acquired the property from the appropriator.[124]

Typically, courts describe abandonment as occurring when an owner relinquishes possession of a chattel with the intention of foregoing any future claim to it.[125] Because it is almost always impossible to prove subjective intent, particularly when, as in most abandonment cases, the original owner will likely deny the intent to abandon in an effort to (re)claim valuable property, the objective circumstances surrounding an owner's relinquishment of possession of the abandoned

---

122 *See* Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 199–200 (2010) ("[T]he common law flatly prohibits the legal abandonment of the fee simple interest in land."); *see also, e.g.*, Pocono Springs Civic Ass'n v. MacKenzie, 667 A.2d, 233, 236 (Pa. Super. Ct. 1995) ("Perfect title, under Pennsylvania law, cannot be abandoned.").

123 *See* Peñalver, *supra* note 122, at 196.

124 *See id.* at 196–97 (explaining the importance of manifestation of intent for an individual seeking to abandon a chattel). For a somewhat different take on the law of abandonment, see generally Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 360 (2010) (describing abandonment as a power that owners enjoy unilaterally to sever their ties to their property).

125 *See* Peñalver, *supra* note 122, at 197.

item are usually decisive. In other words, appearances and context matter. Courts will deem an owner to have abandoned a chattel where the owner gives up possession of it under circumstances suggestive of an intent to forgo future claims.[126]

Thus, although courts ritualistically repeat the formulaic reassurance that mere nonuse, by itself, does not amount to abandonment, they appear to have in mind a kind of attentive nonuse that does not suggest to others the existence of an intent to relinquish future ownership claims. In contrast, inattentive or derelict nonuse creates the appearance of an intent to abandon and will therefore often count as abandonment. Thus, for example, the law of abandonment requires owners of property who have lost possession of it to make active efforts to locate and recover that property in order to maintain a good claim on the property.[127] A subsequent possessor who relies on the message communicated by protracted and derelict nonuse of a chattel will likely prevail against an attempt by the original owner to reassert ownership rights.[128]

The link between nonuse and abandonment is even more explicit within western water law. Within water law, courts often purport to adhere to the traditional common law definition of abandonment. Thus, they describe the doctrine as providing for abandonment only when nonuse is "coupled with an intent to abandon."[129] But, crucially, "intent to abandon a water right may be inferred through the circumstances of a case, and need not be proved directly."[130] And, "[c]ontinued and unexplained nonuse of a water right for an unreasonable period of time creates a rebuttable presumption of intent to

---

126 *See id.* at 192 ("Simply put, the law is said to empower owners of chattels to abandon them by unambiguously manifesting the intent to do so . . . .").

127 This feature of abandonment law coheres with the "discovery rule" approach to adverse possession of chattels. *See* O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980). Some states reject the discovery rule in favor of a "demand and refusal rule" that is more protective of original owners. *See, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429–30 (N.Y. 1991).

128 *See, e.g.*, Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960) ("For a period of 66 years the derelict vessel and her cargo have remained in the exact location. While lapse of time and nonuser are not sufficient, in and of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon.").

129 Haystack Ranch, LLC v. Fazzio, 997 P.2d 548, 552 (Colo. 2000); *accord* Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732, 738 (Wash. 1997) ("Abandonment is the intentional relinquishment of a water right."); *see also* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:89 (2012) ("Abandonment is defined as the intentional relinquishment of a known right . . . .").

130 *Haystack Ranch, LLC*, 997 P.2d at 552; *accord Okanogan Wilderness League, Inc.*, 947 P.2d at 739 ("[T]here should be a rebuttable presumption of intent to abandon from long periods of nonuse.").

abandon."[131] Some western jurisdictions go even further than this, however, and deem water rights abandoned if unused, irrespective of intent. Wyoming's water rights statute, for example, states:

> Where the holder of an appropriation of water from a surface, underground or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated, whether under an adjudicated or unadjudicated right, during any five (5) successive years, he is considered as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto.[132]

INNOCENT IMPROVERS

As abandonment cases and statutes suggest, leaving chattels unused leads to wasteful conflict by increasing the risk that nonowners will innocently put other people's unused property to work as if it were their own. In the context of land, a similar scenario occurs when a builder encroaches on the land of a neighbor, erroneously believing it to be her own. Although this most typically occurs because of surveying errors and usually involves only a few inches or feet of land,[133] the mistake can occasionally be more substantial, sometimes even amounting to the land underneath an entire building.[134]

Applying the doctrine of undue hardship, courts confronted with a conflict between an innocent encroacher and an intransigent landowner seeking to remove the encroachment may deny an injunction forcing the encroacher to remove the encroachment if the cost of removing it would be vastly out of proportion with the injury to the landowner.[135] Instead, courts will often allow the encroachment to remain in place[136] but require the encroacher to purchase the underlying land at a price set by the court, usually measured as the value of the unimproved land.[137]

Even where the entire improvement is on the land of another, courts will normally require the encroacher to turn the improvement

---

131 *Haystack Ranch, LLC*, 997 P.2d at 552 (quoting City & County of Denver v. Snake River Water Dist., 788 P.2d 772, 776 (Colo. 1990)); *see also Okanogan Wilderness League, Inc.*, 947 P.2d at 739 (observing that the "principle applies throughout arid western states which have followed the rule that long periods of nonuse raise a rebuttable presumption of intent to abandon").

132 WYO. STAT. ANN. § 41-3-401 (2011).

133 *See, e.g.*, Mannillo v. Gorski, 255 A.2d 258, 260 (N.J. 1969).

134 *See, e.g.*, Voss v. Forgue, 84 So. 2d 563, 563 (Fla. 1956); Hardy v. Burroughs, 232 N.W. 200, 200 (Mich. 1930); Howard v. Kunto, 477 P.2d 210, 212 (Wash. Ct. App. 1970); Somerville v. Jacobs, 170 S.E.2d 805, 805–06 (W. Va. 1969).

135 *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 50–56 (2007).

136 *See, e.g.*, *Mannillo*, 255 A.2d at 263–64.

137 *See* Kratze v. Indep. Order of Oddfellows, Garden City Lodge No. 11, 500 N.W.2d 115, 124 (Mich. 1993) ("The correct measure of damages is the value of the . . . strip of land itself.").

over to the landowner in exchange for just compensation—with the owner typically having to pay the improver for the value added to the land by the improvement.[138] Because of the inequitable burden this forced sale of the improvement can place on the improver, courts will sometimes order a transfer of ownership of the underlying land to the improver in exchange for damages in the amount of the value of the unimproved land[139] or a suitable substitute parcel of undeveloped land.[140] Where there is evidence that an owner has intentionally stood by while an innocent encroacher has mistakenly invested in improvements on the owner's land in ways that are expensive to undo, courts are particularly likely to employ estoppel to protect the interests of the innocent encroacher.[141]

The active use or attentive nonuse of property reduces the risk of this kind of confusion by conveying useful information to nonowners about ownership of the property and by alerting owners to the encroachment before the innocent improver has sunk enormous resources into the mistake.[142] Thus, doctrines (such as undue hardship) that reduce the availability of injunctive relief for innocent encroachment or that require a forced sale of the land (or compensation to the encroacher for the value of the improvement) increase the cost of exercising the right not to use land. Their operation creates an incentive for owners to police their unused land and intervene early in the event of encroachment by innocent improvers. And estoppel aims to prevent the most egregious attempts to benefit from the mistakes caused by derelict nonuse.

NUISANCE

Owners—through their neglectful nonuse—sometimes permit their land to become repositories for garbage or allow structures on

---

138 *See* J.E. Macy, Annotation, *Measure and Items of Recovery for Improvements Mistakenly Placed or Made on Land of Another*, 24 A.L.R.2d 11, § 15 (1952); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1416 & n.59 (2009).

139 *See, e.g.*, *Somerville*, 170 S.E.2d at 813.

140 *See, e.g.*, Voss v. Forgue, 84 So. 2d 563, 564–65 (Fla. 1956).

141 *See* RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 42 cmt. b (1937); Ollig v. Eagles, 78 N.W.2d 553, 560 (Mich. 1956) (citing "Seavey and Scott's Notes on Section 42 of Restatement (First) of Restitution"); *see also* Olin v. Reinecke, 168 N.E. 676, 678 (Ill. 1929) ("The general rule at law is that, if a stranger enters upon the land of another and makes an improvement by erecting a building, the building becomes the property of the owner of the land. In equity . . . if the owner stands by and permits another to expend money in improving his land, he may be compelled to surrender his rights to the land upon receiving compensation . . . ." (citations omitted)). A similar doctrine can require owners to submit to the use of a right of way over their property by a neighboring landowner. *See, e.g.*, Holbrook v. Taylor, 532 S.W.2d 763, 766 (Ky. 1976).

142 *Cf.* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77–79 (1985) (describing the common law understanding that acts of possession are a kind of "*statement*").

their property to become dangerously dilapidated, infested with vermin, or locations for unsavory or unlawful activity. A failure to maintain one's property that produces such consequences can constitute a public nuisance which state officials can sue to abate.[143] When those consequences of nonuse interfere with the neighbors' use and enjoyment of their own property, those neighbors can also sue under nuisance law for damages or injunctive relief ordering the derelict owner to take affirmative steps to abate the nuisance.[144]

In the past, courts were reluctant to find visual annoyances to be nuisances, in the absence of physical manifestations, such as foul odors or threats to health or safety.[145] Mere unsightliness, the usual account goes, was not enough. In recent years, however, there has been a trend in favor of recognizing visual harm as, by itself, adequate to serve as the basis for a nuisance action.[146] We do not take a position on the desirability of this move except to note that it seems consistent with the basic premises of nuisance law, particularly where there are strong, widely shared norms against the particular type of land use that generates the visual harm.[147]

In the context of nonuse, the particular sorts of unsightliness that tend to arise with nonuse of property—tall grass, weeds, and the accumulation of garbage—are sufficiently disruptive in an urban or suburban environment that they are often singled out by local ordinances

---

143 *See* Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Cir. 2001) ("Regulation of nuisance properties is at the heart of the municipal police power.").

144 *See* RESTATEMENT (SECOND) OF TORTS § 821C & cmt. e (1979) ("When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one. In this case the harm suffered by the plaintiff is of a different kind and he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance.").

145 *See* JESSE DUKEMINIER ET AL., PROPERTY 976 (7th ed. 2010) ("Courts, developing the law of nuisance, rarely declared an ugly site a nuisance."); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1080–87 (1970); Dix W. Noel, Note, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1, 1–5, 8 (1939).

146 *See, e.g.*, Rattigan v. Wile, 841 N.E.2d 680, 689 (Mass. 2006) ("[T]he modern trend is toward recognition that aesthetic considerations may legitimately generate public and private concern."); Foley v. Harris, 286 S.E.2d 186, 190–91(Va. 1982) (holding that unsightly junked cars on lot were a nuisance); John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 286–87 (2001) (detecting a judicial trend in favor of recognizing aesthetic nuisances). *But see* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 999–1000 (2004) ("[P]urely aesthetic nuisances such as parking broken cars are almost never found at all."). Although courts are likely to be reluctant to find nuisances on the basis of mere differences of taste, they seem to be more willing to find an aesthetic nuisance in cases in which they view the defendant's conduct as wrongful in some sense. *See, e.g.*, *Rattigan*, 841 N.E.2d at 688–90.

147 *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728–29 (1973).

for explicit prohibition as public nuisances.[148] Chicago, for example, requires owners of any building that is vacant for more than thirty days to register the building with the city (at a fee of $250 every six months), maintain insurance on the building, post a sign with contact information for the owner, "[c]ut the grass, remove weeds, garbage, debris, dead trees or any fallen limbs. . . .[,] shovel any accumulated snow to allow public use of the adjacent sidewalk and keep the property free from pests such as rats and other rodents."[149]

A court may find an owner who defies an injunction to abate a nuisance to be in contempt and punish the owner accordingly.[150] Where, for example, the owner of an apartment building decides to keep the building vacant, she is obligated to maintain the structure in a safe and sanitary condition.[151] If she fails to do so, there may be private liability to neighbors or, more frequently, the city may step in and demolish the structure, the expense for which becomes a lien on the property.[152] Depending on the costs incurred by the city and the value of the property, the nonusing owner may ultimately lose title to the property.[153]

PERMISSIVE WASTE

The law of waste governs the conflicts of interest that arise between present possessors and the owners of vested future interests. Traditionally, the most common conflicts have involved those between the owners of life estates and those individuals holding remainders.[154] Within the law of waste, courts distinguish between voluntary and permissive waste. Voluntary waste arises from a life tenant's overuse of the life estate in ways that impair the remainder holder's interest in the future enjoyment of the property.[155] Permissive waste, in contrast, "results generally from the failure of the possessor to exercise the care of a reasonable person to preserve and protect the estate for future interests."[156] Voluntary waste is a wrong of commission, and permissive waste is a wrong of omission. Under the doctrine of permissive

---

148 *See, e.g.*, City of Montgomery v. Norman, 816 So. 2d 72, 77 (Ala. Crim. App. 1999) (describing city ordinance); City of Union v. Julius, 706 S.W.2d 513, 514 (Mo. Ct. App. 1986) (describing city ordinance).

149 *Vacant Property Guidelines*, CITY OF CHI., https://www.cityofchicago.org/city/en/depts/bldgs/supp_info/vacant_property_guidelines.html (last visited Apr. 5, 2013); *see* CHI., ILL., MUN. CODE § 13-12-125 (2013).

150 *See* Village of Ottawa Hills v. Afjeh, No. L-10-1353, 2012 WL 121087, at *3–5 (Ohio Ct. App. Jan. 13, 2012).

151 *See, e.g.*, Freeman v. City of Dallas, 242 F.3d 642, 652–53 (5th Cir. 2001).

152 *See, e.g.*, *id.*

153 *See, e.g.*, *id.*

154 *See* KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 69–70 (3d ed. 2001).

155 *See id.* at 70; MERRILL & SMITH, *supra* note 135, at 603–04.

156 POWELL ON REAL PROPERTY § 56.05(2) (Michael Allan Wolf ed., 2013).

waste, derelict nonuse can violate the rights of others with an interest in the property.

Examples of inactive nonuse that constitute permissive waste include allowing a pasture to become overgrown with brush where that is inconsistent with good husbandry,[157] failure to repair leaking roofs,[158] failure to replace a furnace such that a home is damaged by freezing temperatures,[159] failure to paint,[160] failure to maintain gutters,[161] and failure to stabilize a dilapidated structure to prevent further damage or collapse.[162] Permissive waste has an obvious bearing on the scope of a life tenant's right not to use the property because if that nonuse is sufficiently inattentive, the nonusing life tenant will become liable to the holder of the remainder interest and may even forfeit the life estate.[163]

ADVERSE POSSESSION

The law of adverse possession imposes a very direct, though not very demanding, requirement of attentiveness by nonusing landowners.[164] To prevent adverse possession from depriving them of property, owners who opt not to use their land must remain sufficiently involved with it to discover and oust long-term trespassers making open and notorious use of the property. Although the doctrine has numerous—and overlapping—normative justifications, it plainly penalizes the most severely inattentive nonuse: nonuse that sits idly by while another person invests substantial effort in the improvement or alteration of the property.[165] This punitive aspect of adverse posses-

---

157 *See* Clemence v. Steere, 1 R.I. 272, 274 (1850).

158 *See, e.g.*, Genesco Inc. v. Monumental Life Ins. Co., 577 F. Supp. 72, 85 (D.S.C. 1983), *aff'd sub nom.* Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253 (4th Cir. 1984); State v. Delinquent Taxpayers (Provident Props.), No. M2004-00951-COA-R3-CV, 2006 WL 3147060, at *8 (Tenn. Ct. App. Dec. 7, 2006).

159 *See, e.g.*, Stouter v. Bailey, 545 A.2d 98, 102 (Md. Ct. Spec. App. 1988).

160 *See, e.g.*, *In re* Steele, 19 N.J. Eq. 120, 120 (N.J. Ch. 1868).

161 *See, e.g.*, Wade v. Pittsburg Mach. Tool Co., 40 Pa. Super. 365, 369 (Pa. Super. Ct. 1909).

162 *See* THOMPSON ON REAL PROPERTY § 70.08(b)(3)(i) (David A. Thomas ed., 2012).

163 *See, e.g.*, Smith v. Minich, 110 S.E.2d 649, 649 (Ga. 1959) (holding that a petition alleging extreme permissive waste was sufficient to authorize forfeiture of the life estate and immediate possession of the premises by the holders of the remainder interests); RESTATEMENT (FIRST) OF PROP. § 138 (1936). As with waste in general, owners who create life estates can override the law of permissive waste by stating their intent to do so. *See id.* § 141 cmt. a.

164 *See* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 853 (1994) ("The owner aware of adverse possession law is motivated to place her property in at least some minimal form of productive use.").

165 *See* Ewing v. Burnet, 36 U.S. (11 Pet.) 41, 52–53 (1837) ("It is well settled that to constitute an adverse possession, there need not be a fence, building, or other improvement made: it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises . . . ." (citation omitted)); *see also* DUKEMINIER ET AL., *supra* note 145, at 141 (indicating that modern courts are sensitive to the "plight" of the innocent improver).

sion is particularly salient in jurisdictions like Canada that require adverse possessors to show that their use was inconsistent with the owner's use of the property.[166] So disfavored is the egregiously derelict owner that in most jurisdictions, even a knowing trespasser-user (i.e., a squatter) will prevail over a derelict nonusing owner after a sufficient period of time.[167]

NECESSITY

The doctrine of necessity requires the owner to allow a third party to use the owner's property where that use is necessary to avoid the imminent risk of serious harm.[168] Compensation is typically due to the owner only to the extent that property is consumed or damaged, and not for the mere privilege of entry or use.[169] Because the doctrine, stated baldly, does not distinguish between used and unused property and focuses primarily on the degree of the claimant's need,[170] it is tempting to view it as a limit on ownership as such rather than on an owner's right not to use. The doctrine as applied, however, takes into account the balance of burdens imposed on the property owner (from the claimant's use of the property) and on the claimant (from not being allowed to use the property).[171] Consistent with this approach, the Restatement says that a claimant seeking access to a dwelling under the doctrine of necessity may be required to prove more dire need than claimants seeking access to another type of property.[172] The logic of this balancing of burdens suggests that the doctrine of necessity will be more permissive where the person in need is seeking the use of otherwise unused property. In a sense, the law steers the claimant toward unused or underused property, where it is available to meet the claimant's need.

---

166 *See* Katz, *supra* note 114, at 291 n.48, 292 (citing Keefer v. Arillotta (1976), [1977] 13 O.R. 2d 680 (Can. Ont. C.A.)).

167 *See* DUKEMINIER ET AL., *supra* note 145, at 132 (citing 3 AMERICAN LAW OF PROPERTY § 15.4 (1952)); *see also* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1080 (2006). Richard Helmholz has argued that, while formally permitting squatters to take title by adverse possession, many courts actually impose a good faith requirement. *See* R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 356–58 (1983). *But see* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986).

168 *See* Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908) (stating that the doctrine applies "with special force" when preserving human life); RESTATEMENT (SECOND) OF TORTS § 197 (1965).

169 *See* RESTATEMENT (SECOND) OF TORTS § 197(2) cmt. a (1965).

170 *See id.* § 197.

171 *See id.* § 197(1) cmt. c ("In determining the question of reasonableness, the probable advantage to the actor to be expected from the entry must be weighed against the probable detriment to the possessor of the land or other persons properly upon it.").

172 *See id.* cmt. h.

EMINENT DOMAIN

Although the situations most likely to constitute harmful nonuse involve derelict owners who passively allow property to decay, even attentive nonuse can cause harm.[173] Many city residents and governments view large expanses of vacant land to be antithetical to a healthy urban environment.[174] As one Philadelphia community organization put it, "[v]acant properties fester like open sores in our neighborhoods, sapping our wealth and breeding crime and blight."[175] Governments can use eminent domain to override an owner's desire not to use a parcel of property or to warehouse it for later use. The law of eminent domain allows the state to seize property (used or unused) upon payment of just compensation, where the use to which the government would put the property is rationally related to a legitimate public purpose.[176]

The state also has a number of tools short of eminent domain to encourage, or even coerce, owners to make active use of their property where state actors have good reason to think that even attentive nonuse generates unacceptable social costs. Washington, D.C., for example, charges owners of vacant buildings a property tax rate that is over five times higher than the rate paid by owners of occupied residential property.[177] The owners of blighted property must pay a rate that is even higher still.[178] Baltimore recently enacted a targeted property tax cut that benefits owner-occupied homes but excludes, in the words of Baltimore's mayor, "vacant homes owned by irresponsible speculators."[179] Similarly, during the nineteenth century, local governments in the American west attempted to force speculators to put their property to productive use by aggressively using property

---

173 *Cf. Ploof*, 71 A. at 189 (upholding plaintiff's tort claim based on harm sustained as a result of an owner's attentive insistence on nonuse of property during plaintiff's necessity).

174 *See* MICHAEL A. PAGANO & ANN O'M. BOWMAN, BROOKINGS INST., VACANT LAND IN CITIES: AN URBAN RESOURCE 2 (2000), *available at* http://www.brookings.edu/research/reports/2001/01/01-vacant-land-pagano ("[M]any cities, regardless of size and geographic location, expend tremendous resources trying to 'abate' public nuisances associated with vacant and abandoned properties.").

175 *See* CAMPAIGN TO TAKE BACK VACANT LAND, PUT ABANDONED LAND IN OUR HANDS (2011), *available at* http://files.wcrpphila.com/PutAbandonedLandinOurHandsSpring2011.pdf.

176 *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231, 241 (1984).

177 *See* Harvey S. Jacobs, *How Government Can Improve the Market*, WASH. POST, Jan. 7, 2012, at E3; *Real Property Tax Rates*, D.C. OFF. TAX & REVENUE, http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,594394.asp (last visited Mar. 2, 2013).

178 *See* Jacobs, *supra* note 177; *Real Property Tax Rates*, *supra* note 177.

179 Press Release, Office of Mayor Stephanie Rawlings-Blake, City of Balt., Mayor Rawlings-Blake to Introduce Property Tax Cut Legislation (March 19, 2012), *available at* http://www.baltimorecity.gov/OfficeoftheMayor/NewsMedia/tabid/66/ID/2590/Mayor_Rawlings-Blake_to_Introduce_Property_Tax_Cut_Legislation.aspx.

taxes to make it unprofitable to hold land in an undeveloped state for long periods of time.[180]

*****

It would be accurate to say that, as a general rule, as long as an owner attends to the obligation not to harm others, the owner is free to leave the property unused for as long as desired, no matter what the reasons. But the law of tangible property limits the right not to use in the presence of harm. Three categories of harm are particularly salient: With the doctrines of necessity and eminent domain, the harm of allowing the owner's interest in nonuse to prevail is the risk of loss to the claimant due to an inability to make use of the property in question. With nuisance and permissive waste, the relevant harm is an interference with other owners' use and enjoyment of their own property (either contemporaneously or in the future). And with abandonment and adverse possession, the harm involves a kind of tacit inducement to waste time or effort using or appropriating unused and apparently unwanted property. The doctrines of estoppel and undue hardship as applied to innocent improvers combine elements of all three categories of harm.

C. Normative Justifications for the Right Not to Use

While there is a strong first-order normative case for granting owners wide latitude not to use their tangible property, this case holds up only as long as they do not harm others in the process. The law of property is best understood as an institution designed to allocate rights over things in order to foster human flourishing.[181] Because human flourishing involves the pursuit of plural and incommensurable goods, property law must take into account a variety of (sometimes conflicting) values. Among the values relevant to the shaping of a property system are human life and freedom, with the latter understood as encompassing both autonomy and personhood considerations.[182] In addition, because people need material resources in order to flourish, the impact of property rules on social wealth or efficiency is also vitally important to property's service of the goal of

---

180 *See* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS 60 (2010) (noting that local governments supported land squatters over absentee landlords by imposing higher taxes on land).

181 *See* ALEXANDER & PEÑALVER, *supra* note 117, at 80–101.

182 *See, e.g.*, *id.* at 84–89 (discussing Aquinas's views on property and human flourishing, stating that "[p]rivate ownership exists to ensure the ability of human beings (collectively) to flourish").

human flourishing.[183] Where all these various factors point in the same direction, property doctrines are typically uncontroversial.[184] On the question of nonuse, considerations of autonomy and personhood and efficiency all appear to weigh in favor of the shape of existing law.

1. *Autonomy and Personhood*

A system of private ownership serves interests in autonomy and personhood by, among many other things, delegating to private owners authority over privately owned things.[185] As we have already seen in connection with the many qualifications on the right not to use aimed at preventing nonuse from harming nonowners or future owners, that authority is not unbounded.[186] But a significant part of the experience of autonomy and personhood with regard to the use and enjoyment of property consists of determining the timing of the consumption or exploitation of owned property. Implicit in this control over the timing of consumption or exploitation of property is the power to delay these uses by holding the property idle for a time, perhaps even a very long time.

A system of private ownership that places a high value on autonomy and personhood will tend to default toward control of property by owners, including owners' determinations that property should remain unused for a time. In its broadest sense, Penner correctly observes, "'use' refers to a disposition one can make of something that is purposeful and can be interfered with by others." [187] For nonuse to count as a species of use that serves owners' autonomy and personhood, the nonuse must be "purposeful" and involve "intermittent physical interaction" with the property.[188] But where nonuse does not result from such a purposeful plan or where nonuse interferes with third parties' own autonomy-based interests in the use and enjoyment of their own property, this rationale for the right not to use breaks

---

183 *See id.* at 94–97 ("[S]ocieties must struggle with the challenge of providing adequate opportunities for individuals to obtain the things they need in order to function as social beings without . . . undermining the necessary incentives for productive activity.").

184 *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 363–73 (1954) (discussing the difficulties in conceptualizing what property is and formulating a definition).

185 *See id.* at 373 ("Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities . . . ."). By autonomy, we primarily mean, in this context, freedom from coercion or interference by third parties with respect to owned property. By personhood, we mean to refer to a more affirmative power to express one's identity as a person through external material things.

186 *See, e.g.*, *supra* notes 122–53, 164–67 and accompanying text (discussing adverse possession, nuisance, abandonment, and innocent encroachment).

187 PENNER, *supra* note 114, at 70.

188 *See id.*

down. The law of tangible property, as it relates to nonuse, broadly follows this pattern. As our discussion in the preceding pages illustrates, the sort of nonuse that the law protects most robustly is an active, attentive nonuse—the sort of nonuse that most directly serves owners' autonomy and personhood. Such attentive, purposive nonuse is less likely to impose the sorts of harms on third parties associated with more passive, derelict nonuse that the law penalizes.

2. *Efficiency*

A system of private ownership serves the goal of efficiency by allocating authority to make decisions over the use of things to those who derive the most utility from exercising that authority. In the absence of externalities, market failure, or moral constraints, property theorists by and large favor voluntary transactions as the mechanism for moving property toward users who would derive more utility from it.[189] Because of the rivalrous nature of tangible property, if people disagree about how—or, more to the point of this Article, when—to use the same item of property, they both cannot act on their beliefs at the same time with respect to the same property. Early consumption or exploitation of an item of property typically forecloses the possibility of later consumption or exploitation (and vice versa). If an owner thinks the best use of a particular item of property is to attentively hold it idle, the principal recourse in a market system of private ownership for someone who disagrees with the owner is to purchase the property from the owner or to acquire some comparable piece of property, and put it to more beneficial use.[190]

On balance, in the absence of harm to third parties, owners who are good judges of the proper timing of the consumption or exploitation of their property will prosper relative to those who are poor judges. Thus, granting owners broad control over the timing of use creates incentives for owners interested in financial gain to gather good information about how and when to most profitably use their

---

189 *See, e.g.*, ALEXANDER & PEÑALVER, *supra* note 117, at 106–09.

190 Because land can often be put to multiple uses simultaneously, it provides an important exception to this rule, which may explain why numerous legal cultures that we would characterize as being based on market systems of private ownership permit nonowners to engage in nondestructive, simultaneous use of land as long as they do so in ways that accommodate the use choices made by owners. *See supra* note 117 and accompanying text. It might even be better to think of "land" as we understand it in our legal system as a kind of amalgam of discrete items of property. Thus, even a theorist who did not subscribe to a full-blown bundle account of the concept of property might be justified in treating property in land as a (contingent) bundle of discrete, spatially bounded property rights. *Cf.* Cohen, *supra* note 184, at 360–61 (discussing the idea that a fee simple absolute is really just a "sector of space in time").

property.[191] Plausible assumptions about human beings' general tendency toward short-sightedness suggest that, if anything, owners will tend to consume or exploit their property prematurely.[192] Thus, deferring to owners' choices *not* to use their property is most likely, from the standpoint of enhancing aggregate utility over the long run, the proper starting point.

But this is only a starting point. Where harm to third parties from nonuse becomes apparent, the law departs from this default position. Although their content arguably reflects concerns beyond efficiency, the doctrines we have discussed as limiting nonuse all capture situations in which exercising the right not to use property generates significant negative externalities for nonowners (or, in the case of waste, for future owners).[193] Considerations of efficiency therefore appear to point in the same direction as autonomy and personhood and broadly favor the shape of existing property doctrine as it touches on nonuse.

III
The Right Not to Use in Patent

In *Continental Paper Bag*, the Supreme Court held that the right not to use is absolute in traditional property and therefore, as a species of property, patents should enjoy this right as well.[194] As we have shown above in our discussion of tangible property,[195] the law of property as it relates to nonuse is a good deal more complicated than the Court made it out to be in *Continental Paper Bag*. Rather than merely ratifying owners' choices about nonuse, the law of tangible property channels and constrains owners' behavior in situations in which, by not using their property, they harm others. In this section, we will argue that, instead of basing its own approach to nonuse on a caricature of property law, patent law would benefit from adopting a similarly qualified approach to nonuse.

---

191 *See* Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & Econ. S77, S90 (2011); Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821, 853–54 (2009); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. Legal Stud. S453, S463 (2002); Geoffrey K. Turnbull, *The Investment Incentive Effects of Land Use Regulations*, 31 J. Real Est. Fin. & Econ. 357, 363–64 (2005); *see also* R. H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 14, 18 (1959). It is control, and not exclusion as such, that generates these incentives. And owners can enjoy a robust power to control the use of property even where the scope of their right to exclude follows from their use choices (rather than vice versa).

192 Peñalver, *supra* note 191, at 854 (arguing that private actors use high discount rates and disregard long-term consequences when deciding how to use their property).

193 *See supra* Part II.B.

194 Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 424, 429–30 (1908).

195 *See supra* Part II.

A. Justifying Patent Nonuse According to Tangible Property Nonuse

As we did with tangible property,[196] we will evaluate the normative foundations for nonuse in patent by looking to autonomy, personhood, and efficiency. From the standpoint of human flourishing, these are (along with the preservation of human life) the most important considerations. These are also the values that underlie the most influential theories of intellectual property. As we noted above, while conflicts among these considerations can force us to make difficult choices, those choices tend to be easier where the various considerations all point in the same direction. Unlike in the context of tangible property, however, where the important normative considerations appear to line up in support of recognizing a qualified right not to use, in the patent context they provide only weak and speculative support for recognizing such a right at all. Two features of patent are responsible for this difference: First, the nonrivalrous nature of the consumption of information means that use of a patented invention by one party does not deprive the owner of the ability to time her use of the very same patented invention. Second, the necessary impact of patent rights on independent inventors' use and enjoyment of their own property greatly complicates the task of justifying a right not to use an invention where that right includes the right to simultaneously prevent others from using the invention.

1. *Autonomy*

Viewed from one perspective, the nonrivalrous nature of information consumption decisively eliminates the impact of use by third parties on the autonomy of patent owners. With use conflicts over tangible property, the law must choose between two people seeking to make incompatible uses of the same object, or between a nonowner's desires to use the object in the face of the owner's attempt to save it for later. But allowing a third party to practice an invention neither forces the patent owner to use the invention now nor requires the patent owner to forego the power to use it at some later time. The patent owner remains just as free not to practice the invention or to practice it later.

If we define the patent owner's autonomy interest as encompassing the right to control, at least for a limited time, the use of the patented invention by a third party, then that use without the owner's permission would interfere with the autonomy of the patent owner. But to define the patent owner's autonomy interest in such broad terms at the outset would be to beg the question we are attempting to

196 *See supra* Part II.

answer. The question just is whether or why we should understand patent rights to encompass the power to block others from using an invention that the owner has no intention of using. And the impact of patent law on independent inventors shows how such an expansive definition of the right not to use butts up against the autonomy of nonowners to use their own tangible property as they see fit.[197] It is this tendency of patent law, and intellectual property rights generally, to intrude on the freedom of owners with regard to their own tangible property that has made intellectual property the source of a great deal of conflict among libertarian theorists.[198]

Because protecting the freedom of patent owners to control the use of an invention comes at the expense of the freedom of nonowners to control the use of their own tangible property, we need to look elsewhere for reasons to favor the freedom of one of these actors over the other. Although utilitarian accounts of patent law have dominated the academic commentary,[199] considerations of both personhood and utility are potentially relevant to the choice between the autonomy of the patent owner and that of the alleged infringer.

2. *Personhood*

Theories of intellectual property drawing on a number of different philosophical traditions have emphasized the connection between the personal identity of creators and inventors and their intellectual creations. Ayn Rand, for example, was arguing in these terms when she claimed that "[p]atents and copyrights are the legal implementation of the base of all property rights: a man's right to the product of his mind."[200] By granting intellectual property rights, she claimed, "the law establishes the property right of a mind to that which it has brought into existence."[201] Justin Hughes describes the Hegelian account of intellectual property in similar terms as based on the intuition that "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self."[202]

Viewing the question of nonuse through the lens of personhood arguably favors a robust conception of the right not to use. The close connection between the inventor and the invention suggests why inventors might conceivably have some personhood interests at stake in

---

197 *See* Vermont, *supra* note 92, at 478.

198 *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 141 (1974) (discussing the indeterminacy of libertarian ideals with respect to intellectual property).

199 *See* MERGES ET AL., *supra* note 35, at 2.

200 Ayn Rand, *Patents and Copyrights*, *in* CAPITALISM: THE UNKNOWN IDEAL 125, 125 (1966).

201 *Id.*

202 *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988).

controlling the nonuse of their invention.[203] As Christopher Yoo has recently argued in the copyright context, however, personhood interests also accrue to those who would like to use another person's intellectual property as part of their own creative efforts.[204] The same is likely true of patented inventions, at least in those circumstances where personhood considerations are implicated. Thus, we do not consider personhood to count strongly in favor of recognizing robust rights not to use, particularly in light of patent's time-limited nature and the personhood interests of the people seeking to practice the invention that the patent owner is content not to use. But we are willing to treat this concern over control of an invention as counting, albeit weakly, in favor of some limited right not to use a patent.

Even more importantly for our purposes, this (weak) personhood justification for nonuse would only seem to apply to a patent owner who consistently and attentively monitors the nonuse of the invention. Intermittent or delayed invocation of the patent owner's interest in nonuse would seem to undercut the legitimacy of an inventor's claim that nonuse of the invention reflects important personhood concerns. Moreover, any personhood implications of nonuse depend on a tight connection between the individual inventor and the invention. Where that connection is lacking, personhood will not have as many implications for nonuse. Where the invention is the product of col-

---

[203] Consider, for example, an inventor who creates a new device for terminating pregnancies and obtains a patent for it. Shortly after obtaining the patent, she undergoes a religious conversion and comes to believe that the use of her device is always deeply immoral and ceases to practice the invention. It is not hard to understand how, in light of the tight link between her mind and her invention, the inventor might perceive the use of her invention by others against her wishes as in some sense an assault on her (new) personal identity. At one time, patent law prevented patents on immoral subject matter by requiring that inventions be beneficial to society rather than "frivolous or injurious to the well-being, good policy, or sound morals of society" to satisfy the utility requirement for patentability. *See* Lowell v. Lewis, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8568) ("[A] new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention."); Bedford v. Hunt, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (No. 1217). For example, machines useful exclusively for "gambling purposes" were not patentable. *See, e.g.*, Nat'l Automatic Device Co. v. Lloyd, 40 F. 89, 89–90 (N.D. Ill. 1889) (citing exclusion of immoral purposes from utility in *Bedford*). That prohibition was based on collective morals and has in any event largely disappeared. *See* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1366–67 (Fed. Cir. 1999). While the state has left the business of weighing the morality of patents, the possibility that a private party might acquire a patent for an invention they consider to be immoral solely in order to block its implementation raises an interesting question. Imagine that an anti-abortion activist purchases the patent invented by our hypothetical doctor solely in order to insure that the new technique is never used, at least during the life of the patent. We do not rule out the possibility that the nonuse of the patent could plausibly constitute an important personhood interest for that person.

[204] Christopher S. Yoo, *Copyright and Personhood Revisited* 4–5 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 12-39), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160441.

laboration, where it is created by an employee of the patent owner, or where the patent owner simply acquires the patent from the inventor, the link will be attenuated.

Independent invention will similarly weaken any personhood link between an initial inventor and the near absolute exclusion currently granted by patent law. From a narrow personhood standpoint, an independent inventor stands in precisely the same relationship to the invention as the original inventor who holds the patent. If the reason for honoring a patent owner's desire not to practice her invention is the status of the invention as a product of the inventor's intellectual efforts, that reason would suggest not honoring that desire where doing so would interfere with the same relationship between another inventor and that inventor's independent intellectual creation.[205]

3. *Efficiency*

Efficiency considerations only favor recognizing a robust right not to use and, importantly, the ability to block others' use if doing so will increase overall utility, not just patent holders' net worth. The usual argument is that the two are connected.[206] In patent, recognizing a robust right to exclude third parties from using a patented invention enhances utility by creating incentives for inventors to invest time and resources in the creation of new inventions and by facilitating transactions once the invention has been created. But the application of this utilitarian story becomes more complicated if we are talking about a patent owner who is not proactively using and disseminating, and therefore not taking advantage of her opportunity to profit from her invention, but is instead only leveraging patent exclusion to block the invention's use or exploiting the leverage provided by the power to block those who are. There are two arguments supporting the position that recognizing a robust right not to use while also blocking third parties from using is a utility-enhancing strategy: an argument based on negative consequences of premature exploitation for overall demand and a revised version of the argument from incentives.

First, in some cases, early exploitation of the patent may have the effect of shrinking the overall profit generated by the patented invention relative to the counterfactual of a period of nonuse followed by later exploitation.[207] It is not unreasonable to think that a period of

---

205 *See* NOZICK, *supra* note 198, at 182.

206 *See* Julie S. Turner, Comment, *The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CALIF. L. REV. 179, 186–88 (1998) (describing the "incentive-to-invent" theory, where income received from patents is necessary to encourage innovation).

207 *See id.* at 182–83 (explaining that patent owners might "sit" on a patent right because the invention may not be commercially viable initially but that viability might change as time progresses).

temporary nonuse of a patent followed by exploitation later in the patent's lifecycle might be a profit maximizing strategy over the total life of the patent. That strategy would be undermined by allowing others to step in and exploit a patent when its owner has chosen not to use it. If an invention would work better, for example, when marketed along with another device still under development, premature exploitation might poison the well of consumer demand by stigmatizing the product and making it harder to market once the later device comes on line. Although conceivable, this scenario strikes us as sufficiently unusual such that it does not cut strongly in favor of recognizing an unqualified right not to use. In any event, it would seem only to favor recognition of purposeful and self-consciously temporary nonuse as part of a longer-term marketing strategy, not permanent or indefinite nonuse. It would certainly not cover the behavior of the patent owner in *Continental Paper Bag*, and it does not cover the sort of ad hoc, opportunistic behavior characteristic of pure patent assertion entities.

A second, broader utilitarian argument for a right not to use the patent is the incentives story that Lior Strahilevitz has described but not fully endorsed.[208] Discussing *Continental Paper Bag*, Strahilevitz says the following:

> Viewed ex ante . . . a plausible justification for the result in *Continental Paper Bag* emerges. It might be the case that were companies like Eastern not permitted to obtain blocking patents to protect their previous patents, they would not make the necessary investment of resources into inventing either the previous inventions or the blocking improvements. In other words, the availability of blocking patents may be a necessary part of the incentives that the patent system uses to encourage innovation in particular industries. When 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.[209]

Strahilevitz's argument focuses on the specific facts of *Continental Paper Bag*, in which the plaintiff was using the patent to block competitors from operating machines that might have reduced the profitability of the plaintiff's existing manufacturing business. It does not address itself to the question of patent trolls. Nevertheless, the basic structure of his incentives argument can easily be extended to

---

208 *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 811 (2005); *see also* Roger D. Blair & Thomas F. Cotter, *Rethinking Patent Damages*, 10 TEX. INTELL. PROP. L.J. 1, 74–84 (2001) (discussing the incentives which may cause a patent holder not to practice a patent and what those incentives mean for calculating damages in the case of infringement of such patents).

209 Strahilevitz, *supra* note 208, at 811.

cover them. The idea would be that the possibility of increased, private returns to inventors or their transferees from a strategy of patent trolling (nonuse of their patent coupled with active pursuit of lawsuits to extract rents from infringers) may supply a significant increment of incentive for the production of new inventions. Recognizing the right not to use comes at a cost in some cases, but, overall, the consequence of granting the right will nonetheless be greater innovation through its enhancement of the incentives established by the patent system. As Strahilevitz concedes with respect to blocking patents, this "additional incentives" explanation may amount to a "just-so" story.[210] This seems equally true of our modified incentives argument for allowing patent trolls. It is hard to know how much weight to give to the bare assertion that some innovation may not occur if the right not to use is not available to potential inventors, and that the lost increment of innovation outweighs the costs of recognizing the right.

On balance, we do not find the incentive story in support of a right not to use to be compelling in the patent context. The benefits of recognizing a right not to use in terms of incentives to innovate are highly indirect and almost impossible to measure. This particular style of speculative incentive narrative has been derided as "peculiarly unsusceptible to empirical proof"[211] and is still today "extraordinarily indeterminate."[212]

In the absence of any compelling empirical evidence either way, the question of what to do with the incentives argument probably comes down to defaults. If our default position is to favor market competition over monopoly, this argument is probably not enough to provide utilitarian justification for legal recognition of the right not to use.[213] To the extent that incentives considerations could be said to support recognition of some limited right not to use one's patent (and to block others from doing so), they would seem to do so most plausibly, not for the patent troll, but where nonuse is part of a purposive strategy that aims to maximize the owner's income from the patent over its entire lifetime. While this might encompass the blocking

---

210 *Id.*

211 *See* WARD S. BOWMAN, JR., PATENT AND ANTITRUST LAW 50 (1973) (noting the difficulty in determining whether a given length of patent term overrewards or underrewards invention).

212 JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 41 (1996) (noting the disagreement among economists as to the efficiency of the patent system for encouraging innovation).

213 The speculative nature of these incentive-based arguments relative to the widespread agreement about the efficiency benefits of a right not to use in tangible property should at the very least strongly urge caution in using the property analogy to support a robust right not to use in patent law.

patent strategy used by the plaintiff in *Continental Paper Bag*,[214] it would plainly not cover the passive, opportunistic strategy at work in the typical patent assertion business model.

Moreover, as to both patent trolls and blocking patents, within a utilitarian framework, we need to consider the costs of providing the extra incentive generated by recognizing a right not to use. There are real and immediate costs to recognizing that right. In particular, three sorts of harm associated with patent nonuse are especially significant: (1) foregone consumption,[215] (2) increased risk of inadvertent infringement,[216] and (3) increased risk of losing the invention.[217] All of these are either absent or (as we will see) partially mitigated by offsetting benefits in the context of unused tangible property.

As we discussed above, because objects of traditional property are consumed rivalrously, nonuse can—from an efficiency standpoint—be an entirely legitimate choice. Building a housing development on Blackacre now means that, for all practical purposes, Blackacre will not be available for a nature preserve in ten years. [218] If we allow owners to store up a reservoir full of oil in the hope that prices will rise over the long run, that oil will not be available for consumers to purchase and use in the short term. Someone has to decide whether to develop Blackacre now or save it for later, or whether to store the oil or consume it now. Trying to figure out who should make these decisions and how they should go about deciding is one of the central puzzles of theories of tangible property. Despite its apparent passivity, purposeful nonuse is in fact a legitimate choice by the owner that can, under the right circumstances, help the resource ultimately move to its highest valued (non)use. The law of tangible property by and large creates space for owners to make these timing choices in the first instance.

But this justification for nonuse is not available for patent. A patentable invention must have a "specific benefit . . . in currently available form."[219] Because of this, society already knows, as a matter of static efficiency, how to allocate the right to use the invention. As pointed out by Kenneth Arrow, "information . . . , say a new method of production, should, from the welfare point of view, be available [to

---

214 *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 428 (1908) (citing Cont'l Paper Bag Co. v. E. Paper Bag Co., 150 F. 741, 743 (1st Cir. 1906)); Strahilevitz, *supra* note 208, at 811.

215 *See infra* notes 218–24 and accompanying text.

216 *See infra* notes 225–30 and accompanying text.

217 *See infra* notes 231–32 and accompanying text.

218 *See* Eduardo M. Peñalver, *Property's Memories*, 80 FORDHAM L. REV. 1071, 1079–81 (2011) ("Very often . . . land is sufficiently stable that human transformations will remain in place almost indefinitely unless human beings actively restore the land to its prior form.").

219 Brenner v. Manson, 383 U.S. 519, 534–35 (1966).

all] . . . . This insures optimal utilization of the information . . . ."[220] Rather than supporting patent nonuse, then, static considerations push strongly against supporting a right not to use that includes a right to block others from using the invention.

Where patent owners claim a right not to use, they are not just claiming that they have no obligation to use their invention but also that their patent confers the right to block others from using the patented invention, even with the others' own tangible property and even where those others have independently developed the same invention. This is always costly. As noted by Arrow, "precisely to the extent that [patent exclusion] is successful, there is an underutilization of . . . information."[221] Arrow was lamenting the underutilization from pricing of the invention above marginal cost.[222] In that situation, some (but not all) potential users are getting access. In the pure nonuse scenario, in contrast, no one is getting access to the invention.

Because of the nonrivalrous nature of information consumption, this consumption loss works differently in the patent context than it does with tangible property. Although third parties also do not consume unused tangible property, that cost is necessary to protect the owner's opportunity to consume or use the property at some later time.[223] In the case of patent, however, the loss of consumption due to nonuse is a pure loss. During the term of the unused patent, all of the utility of the invention is withheld from consumers.[224] The loss associated with forgone patent consumption is particularly acute with respect to situations covered by the doctrine of necessity within tangible property law. Where the owner of a patent covering some resource necessary to sustain lives chooses not to use the invention, the costs of legally recognizing a right not to use would be exceptionally high.

In addition to consumer deadweight loss, nonuse also encourages a kind of induced waste. Once an invention has been created, there is no social benefit to spending further resources to (re)discover the

---

220 Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* NAT'L BUREAU OF ECON. RESEARCH, THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 616–17 (1962).

221 *Id.* at 617.

222 *Id.* at 617–19.

223 We are assuming here an actual conflict over the timing of use. Where resources (such as land) can support multiple nonconflicting uses, protecting the right not to use against demands to engage in nonconflicting uses (e.g., through exclusion) is not strictly necessary to protect control over the timing of use, though it may be desirable in order to indirectly protect or enhance owners' control of their property. *See* Smith, *supra* note 114, at 1693–94. The indirect protection of control through exclusion more closely resembles the situation of nonuse in patent.

224 With technology advancing at such a blistering pace, in some areas of technology, an invention may well be worthless (from the standpoint of public consumption) when the public finally can have access at the expiration of the patent.

same innovation. Independent inventors expend valuable scarce resources reinventing the patented invention. It is a plausible assumption that a patent holder openly practicing an invention by manufacturing or licensing the invention provides a kind of notice to other inventors that reduces the occurrence of such waste. Indeed, the ability to obtain a patent in order not to use it will be most valuable and will provide the most incentive precisely where the benefit to society of granting a patent monopoly seems lowest—where independent inventors are highly likely to come up with the same idea on their own in order to practice the invention.

The waste induced by patent nonuse includes not only the resources used in the reinvention process but also the costs associated with litigation over the patented invention, costs that might have been avoided had the independent inventor known about the patent.[225] Although patents supposedly provide notice through the patent disclosure process, the volume of patents granted is so high that the quality of this notice is fairly attenuated.[226] Actual notice derived from actively monitoring issued patents is prohibitively expensive.[227] Moreover, penalties associated with a finding of willful infringement discourage competing inventors from carefully scrutinizing patent disclosures.[228]

Crucially, from the perspective of patent assertion entities, this induced waste is a feature, not a bug. The patent assertion business model is more lucrative the larger the investments that have been sunk into a project by independent developers at the time the patent assertion entity enters the scene.[229] The patent assertion entity therefore has an incentive to maximize that waste in order to increase its own private gains. Unlike the owner of tangible property, on whom the law may visit a remedial penalty if she allows her property to look as if no one wants it, a patent owner operating under the *Continental Paper Bag* version of the right not to use actually *increases* her benefits

---

225 *See* James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. (forthcoming Jan. 2014) (manuscript at 6–7), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210.

226 *See* BESSEN & MEURER, *supra* note 17, at 8–9.

227 *See* Christina Mulligan & Timothy B. Lee, *Scaling the Patent System*, N.Y.U. ANN. SURV. AM. L. (forthcoming) (manuscript at 15–16), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016968 ("Even if a patent lawyer only needed to look at a [software] patent for 10 minutes, on average, to determine whether *any* part of a particular firm's software infringed it, it would require roughly 2 million patent attorneys, working full-time, to compare every firm's products with every patent issued in a given year. At a rate of $100 per hour, that would cost $400 billion. For comparison, the software industry was valued at $225.5 billion in 2010.").

228 *See* Mark A. Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19, 21–22.

229 *See* Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2126 (2009).

the more people stumble into infringing on the patent and the more costly it is for them to get out.[230]

Finally, and most speculatively, practicing an invention is a way of reducing the risk of losing an innovation. The actual practice of an invention integrates it more securely within the storehouse of human knowledge. Nonuse of an invention introduces the risk that the innovation will simply be forgotten, thereby necessitating expenditure of resources toward its reinvention even after patent protection has expired.[231] Furthermore, in an era where strong network externalities accompany technology, intentional suppression can prevent those externalities from developing and can prevent the technology from integrating itself into common usage. When the patent expires, the public may have little use for the invention not because it is inherently not useful but rather because during the period of suppression, alternative paths developed and became dominant. In a sense, the public may never get to know how useful such technology could have been. Viewed through this temporal lens, patent nonuse may constitute an IP analog of permissive waste in the tangible property context. The public has a future interest in the "remainder" of the patent owner's time-limited right to the invention—the incorporation of the patented invention into the public domain upon the expiration of the patent. This future interest has long been understood to be an essential part of the patent bargain: the public grants the inventor a time-limited monopoly in exchange for the inventor's disclosure of the invention.[232] When an invention is forgotten because of the patent holder's intentional suppression of the invention, the public suffers a loss akin to that experienced by the holders of remainder interests in a property when the life tenant fails to maintain it. Although we normally think it is hard to harm an idea, the possibility that a piece of knowledge may be forgotten or condemned to irrelevancy if not used suggests that useful ideas can spoil when they go unused.

There appears to be no compelling first-order utilitarian justification for giving legal protection for nonuse across the board, especially for the kind of nonuse in which patent assertion entities engage. Such nonuse is not part of a concerted strategy to market the pat-

---

230 *See* CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT 295–99 (2012) (describing the "catastrophically negative" implications of *Continental Paper Bag*, especially for independent inventors).

231 *Cf.* Peñalver, *supra* note 218, at 1079–80 (2011) (describing how human memory can be inscribed in property).

232 *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.").

ented invention. Instead, it involves merely opportunistically waiting in the hope that someone with sufficiently deep pockets will inadvertently stumble into infringing on the patent before it expires. In the meantime, the patent assertion entity is willing to warehouse the patent indefinitely, even to its expiration, without making active efforts to exploit it.

B. Conclusions: The Weakness of the Normative Case for Recognizing a Right Not to Use in Patent

To recap, the normative considerations that justify nonuse in the tangible property context do not favor a robust interest by patent owners in the power not to use their inventions while, at the same time, preventing others (including independent inventors) from doing so. To the extent that they offer support for the power of patent owners not to practice their invention, they seem most plausibly to do so for two reasons: to maintain patent's incentive structure or to protect the personhood interest of an inventor. The former reason only applies where nonuse occurs as part of a concerted and consistent strategy by the patent owner to maximize the value of use of the patent over its entire lifetime by managing the timing of the invention's use. The personhood justification only applies, if at all, to an individual inventor who consistently tries to block use of the patented invention, and even where that is the case, protecting personhood interest does not justify blocking use by independent inventors.

Patent assertion entities do not fit into either of these categories. They are typically not the sorts of patent owners who could plausibly assert strong personhood interests in nonuse. Moreover, their nonuse is not part of a purposive strategy to maximize the value of the patented invention over the lifetime of the patent by carefully timing its use in response to perceived market conditions. Instead, for patent trolls, nonuse is part of a business model that depends entirely on *others* interpreting those market conditions and disseminating the invention, or not, as the case may be. Such a passive, opportunistic strategy is too far removed from the patent incentives model to justify paying the social costs of nonuse. The lack of normative support for recognizing a right not to use within patent law suggests that the zone of permissible nonuse should be narrower in the patent context than it is within the law of tangible property.

Although the first-order normative case on behalf of nonuse is weak, it is important to consider the possibility that second-order considerations, particularly those having to do with information and administration costs (such as the difficulty of distinguishing between different kinds of nonusers or between bad faith and inadvertent in-

fringers), might provide a reason to treat all acts of nonuse alike.[233] As Henry Smith puts it: "If any nonpracticing entity is treated as a troll and is unable to get an injunction, specialization in R&D versus manufacturing is problematic. If nonpracticing and nonlicensing entities are per se problematic, this also gives the first potential licensee a lot of leverage."[234]

Smith's insights about the risks for practicing entities of penalizing nonpracticing entities are valuable, but they do not support broad legal recognition of an unconstrained right not to use along the lines favored by *Continental Paper Bag*.[235] This is particularly clear if the duty to use is only enforced where a patent owner asserts a claim for infringement against an independent inventor. Limiting the duty to use in this way does not create an incentive for aggressive infringers to actively force owners to defend their various timing and use decisions, a situation that would seem more likely to generate some of the problems that worry Smith. Restricting consideration of nonuse to infringement claims against independent inventors would narrow the range of cases in which owners would have to justify their choices to those in which the costs of nonuse are the highest. It would preserve the benefits of a broad delegation of discretion over use in the patent context while limiting the most palpable costs of nonuse. The common law of property's long experience with the many doctrines regulating the distinction between harmful and harmless nonuse suggests that a context-specific response to nonuse in the patent arena would not necessarily generate overwhelming information or administrative costs.

Indeed, the sorts of informational considerations highlighted by Smith likely counsel *in favor of* enforcing an obligation to use the patent. In contrast to tangible property, patent rights define duties whose boundaries are more costly and difficult for nonowners to discern,[236] even with the constructive notice provided by the publication of issued patents.[237] As we have discussed above, actual use of a patent creates valuable information.[238] Using and disseminating an invention enhances the notice to third parties about the existence and nature of a patented invention that can help good faith actors reduce the risk of inadvertent infringement. Thus, there are significant infor-

---

233 *See* Smith, *supra* note 119, at 1783–86.

234 *See* Smith, *supra* note 229, at 2126.

235 210 U.S. 405, 424, 429–30 (1908).

236 *See* Liivak, *supra* note 92, at 1676–80.

237 The Official Gazette of the United States Patent and Trademark Office publishes each patent issued by the USPTO.

238 *See supra* Part III.A.3.

mational costs to recognizing a right not to use in patent law.[239] Enforcing an obligation to use would not only foster first order social benefits but would also arguably help to reduce the informational burdens imposed by hard-to-detect patent boundaries. As we will show in Part IV, a shift in the direction we are recommending already appears to be occurring within patent law.

IV
Preventing the Harmful Nonuse of Patents

To summarize our argument so far, a sophisticated comparison of patent to tangible property does not offer much support for recognition of a broad right not to use within patent law. Tangible property law permits owners not to use their property, but that is because the rivalrous nature of tangible property means that recognizing the right not to use generates significant autonomy and personhood benefits for owners and simultaneously serves social interests in efficiency. Even with these benefits, property law restricts nonuse where it results in (1) serious injury to a claimant seeking a right to use the unused property, (2) interference with others' ability to use and enjoy their own property, and (3) inducement to waste time or effort appropriating the unused property.[240] As our discussion in Part III showed, enforcing an unused patent against independent inventors introduces the risk of very similar sorts of harms. Unlike tangible property, however, it does so while generating few apparent offsetting benefits. When a patent owner does not use the invention, others waste time and effort reinventing it. If the patent owner then attempts to enjoin or seek damages from independent inventors who have sunk time and money into independently generating the unused innovation, the patent owner interferes with the inventors' use and enjoyment of their own property. Where the patent covers an invention that others need for their well-being, the nonusing patent owner may generate all three sorts of harm.

A comparison of property to patent therefore supports confining patent owners' right not to use their invention within narrower bounds than in the domain of tangible property. Rather than starting with a default in favor of nonuse in the absence of a demonstration of harm to third parties, the law might begin with a default in favor of

---

239 *See* Tun-Jen Chiang, *The Reciprocity of Search*, 66 Vand. L. Rev. 1, 20–27 (2013) (describing search costs as a transaction cost in patent law where the patent holder may be the lowest cost searcher and therefore has the burden to seek out users of the invention); *see also* 35 U.S.C. § 287(a) (2006 & Supp. V 2011) (describing patent marking and the consequences of failing to mark). *But see* Ted Sichelman, *Commercializing Patents*, 62 Stan. L. Rev. 341, 362–76 (2010) (raising concerns about commercialization obligations and the identity problem).

240 *See supra* notes 143–63, 168–72 and accompanying text.

active use, departing from it only in the presence of special circumstances, such as knowing infringement. Such a shift could occur through a variety of mechanisms.

As patent law is a statutory body of law,[241] Congress certainly has the authority to modify almost all aspects of it.[242] While international commitments might make it difficult for Congress to condition the ongoing validity of patent rights on diligent efforts to disseminate the invention to users,[243] the obstacles are probably not insurmountable. Alternatively, Congress could modify the statutory provisions on remedies to effectuate a de facto obligation by patent holders to disseminate the invention. We are not endorsing this strategy but simply observing the kinds of modifications Congress has the power to implement. Such congressional modification of the right not to use would be very unlikely to run afoul of constitutional property protections. Instead, a congressionally imposed duty to disseminate inventions would be akin to countless regulations of tangible property, past and present.[244] Because of their necessarily prospective and general nature, statutory interventions may be ill equipped to distinguish effectively among patent trolls, research and development specialists, independent inventors, and willful infringers.

In any event, federal courts have ample tools at their disposal to permit them to, in effect, impose on patent owners a limited duty to disseminate their inventions even in the absence of congressional action. In the domain of remedies, courts enjoy a great deal of discretion, and judicial reform of nonuse could operate through that avenue. [245] In particular, courts could restructure patent remedies—both injunctive relief and damages—to take nonuse into account. As outlined above in Part III, we think there is, at best, only a weak, speculative case for any net harm caused by independent inventors infringing on an unused patent. Where a patent is being practiced, the case for harm from infringement looks substantially different. In assessing remedies for an independent inventor's infringement of an

---

241 Howard T. Markey, *Why Not the Statute?*, 65 J. PAT. & TRADEMARK OFF. SOC'Y 331, 331 (1983).

242 *See* Graham v. John Deere Co., 383 U.S. 1, 6 (1966) ("[T]he Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.").

243 *See, e.g.*, Paris Convention for the Protection of Industrial Property art. 4, Mar. 20, 1883, *as revised at* Stockholm, July 14, 1967, 21 U.S.T. 1583.

244 *See* Hart, *supra* note 116, at 1259–63. As a harm-preventing regulation, even the application of a duty to practice an invention on existing patents would not violate constitutional property protections. *Cf.* Hadacheck v. Sebastian, 239 U.S. 394, 405, 412–14 (1915) (holding valid application of a new municipal nuisance ordinance prohibiting brickmaking within city limits against a landowner who had purchased the land for the purposes of brickmaking).

245 *See infra* notes 303–06.

unused patent, judges should require the patent owner to show some proof of harm. Because proving harm would be difficult for the specific case of infringement of nonused patents by independent inventors, this more searching inquiry into harm will likely reduce injunctive relief and damages for patent assertion. Indeed, lower courts already appear to be adopting this approach with regard to injunctive relief in response to the Supreme Court's decision in *eBay*,[246] and we think that the normative considerations we have been discussing support similar reform of patent damages as well.

A. Injunctions

There have been earlier calls for reducing the availability of injunctive relief for patent holders that are not practicing the invention.[247] Our point is to highlight that such reforms are supported by the comparison between patents and property. Indeed, since the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange, L.L.C.*,[248] district courts appear to have already begun moving in that direction.

In *eBay*, the patent holder MercExchange asserted its patent for "[a] method and apparatus for creating a computerized market for used and collectible goods"[249] against the popular and well-known Internet auction site, eBay. In the district court, the jury found that MercExchange's patent was valid, that eBay had infringed on it, and that damages should be awarded.[250] But the district court denied MercExchange's request for a permanent injunction.[251] MercExchange had licensed the *patent* to others, and the district court reasoned that a "plaintiff's willingness to license its patents" and "its lack of commercial activity in practicing the patents" would be sufficient to rebut the presumption that the patent holder would "suffer irreparable harm if an injunction does not issue."[252] The Court of Appeals for the Federal Circuit reversed the denial of the permanent injunction while noting its "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."[253] The Supreme Court granted certiorari and vacated the judgment of the court of appeals.[254] The Supreme Court criticized both lower courts for having applied categorical rules in consid-

---

246 *See* Golden, *supra* note 76, at 2113

247 *See* Turner, *supra* note 206, at 199–204.

248 547 U.S. 388 (2006).

249 U.S. Patent No. 5,845,265, at [57] (filed Nov. 7, 1995); *eBay*, 547 U.S. at 390.

250 MercExchange, L.L.C. v. eBay Inc., 275 F. Supp. 2d 695, 698–99 (E.D. Va. 2003), *aff'd in part and rev'd in part*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006).

251 *Id.* at 715.

252 *Id.* at 712.

253 *MercExchange*, 401 F.3d at 1339.

254 *See eBay*, 547 U.S. at 390–91.

ering whether to grant permanent injunctions.[255] The Supreme Court criticized the district court for developing what amounted to as a categorical rule against injunctions for nonusing owners, noting that this particular categorical rule was "in tension with" the Supreme Court's own decision in *Continental Paper Bag*.[256] Nor did the Supreme Court spare the Federal Circuit. "Just as the District Court erred in its categorical denial of injunctive relief," the Supreme Court chided, "the Court of Appeals erred in its categorical grant of such relief."[257] The Court held that the "decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases."[258]

Every member of the court joined the opinion of the Court in *eBay*,[259] but the case produced two very interesting concurring opinions. Chief Justice Roberts, joined by Justice Scalia and Justice Ginsburg, suggested that, while injunctions should not be automatic, patent infringement would be very likely to justify injunctive relief in most cases.[260] The Chief Justice alluded to past practice to this effect, pointedly observing that "a page of history is worth a volume of logic."[261] Justice Kennedy's concurring opinion, joined by Justices Stevens, Souter, and Breyer, took the opposite tack. Justice Kennedy emphasized that "the existence of a right to exclude does not dictate the remedy for a violation of that right" and noted that "[t]o the extent earlier cases establish a pattern of granting an injunction against patent infringers almost as a matter of course, this pattern simply illustrates the result of the four-factor test in the contexts then prevalent."[262] He specifically considered the relevance of nonuse to the propriety of injunctive relief, noting that "the economic function of the [nonusing] patent holder presents considerations quite unlike earlier cases."[263] He then turned to the problem of the patent assertion business model. "An industry has developed," he said, "in which firms use patents not as a basis for producing and selling goods but,

---

255 *See id.* at 392–94 ("Neither the District Court nor the Court of Appeals below fairly applied the[ ] traditional equitable principles in deciding respondent's motion for a permanent injunction.").

256 *Id.* at 393 (citing Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 422–30 (1908)).

257 *Id.* at 394.

258 *Id.*

259 *Id.* at 388.

260 *See id.* at 395 (Roberts, C.J., concurring).

261 *Id.* (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

262 *Id.* at 396 (Kennedy, J., concurring).

263 *Id.*

instead, primarily for obtaining licensing fees."[264] He concluded that "equitable discretion over injunctions, granted by the Patent Act, is well suited to allow courts to adapt to the rapid technological and legal developments in the patent system" and "district courts must determine whether past practice fits the circumstances of the cases before them."[265]

Though the Court's opinion in *eBay* approvingly cited to *Continental Paper Bag*, [266] the two concurrences point toward disagreement about its continuing implications for the right not to use.[267] The difference between these two approaches to permanent injunctions matters a great deal for patent assertion entities. While most patent trolls are not interested in *enforcing* a permanent injunction against their targets, the plausible threat of the permanent injunction helps them to extract maximum value out of users who have sunk enormous costs into the infringing activity.[268] Recall the now infamous case of *NTP, Inc. v. Research in Motion, Ltd.*[269] In that case, NTP, a patent-holding company, sued Research in Motion (RIM), the maker of the formerly ubiquitous BlackBerry.[270] The patents were found to be valid and infringed upon by RIM.[271] The district court granted $53.7 million in damages to NTP.[272] But even more importantly, it granted a permanent injunction that threatened to shut down the entire BlackBerry network.[273] Over the course of the next few months, RIM desperately tried to settle with NTP all the while cowering under the shadow of the impending shutdown.[274] Ultimately, RIM settled with NTP for $612 million.[275] Most commentators agree,[276] and common sense

---

264 *Id.*

265 *Id.* at 397.

266 *Id.* at 393 (majority opinion) (noting the district court's failure to apply *Continental Paper Bag*).

267 *Compare id.* at 395 (Roberts, C.J., concurring) (noting that the practice of courts granting injunctive relief against patent infringers is not surprising given "the difficulty of protecting a right to *exclude* through monetary remedies") *with id.* at 396 (Kennedy, J. concurring) (rejecting Chief Justice Roberts's notion that "issuing injunctions against patent infringers" rests on "'the difficulty of protecting a right to *exclude* through monetary remedies'").

268 *See id.* at 396–97 (Kennedy, J., concurring).

269 418 F.3d 1282 (Fed. Cir. 2005).

270 *Id.* at 1290.

271 *Id.* at 1291–92.

272 *Id.* at 1292.

273 *Id.*

274 *See* Ian Austen, *Companies Unable to Settle BlackBerry Suit*, N.Y. TIMES (June 10, 2005), http://www.nytimes.com/2005/06/10/technology/10blackberry.html.

275 *See* Ian Austen, *BlackBerry Maker Reaches Deal in Patent Dispute*, N.Y. TIMES (Mar. 3, 2006), http://www.nytimes.com/2006/03/03/technology/03cnd-blackberry.html.

276 *See* Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties*, 12 AM. L. & ECON. REV. 280, 281 (2010) ("To many observers, this payment reflected the strong bargaining position NTP enjoyed by virtue of its threat to shut down BlackBerry service, not the underlying value of NTP's patented technology.").

suggests, that the bulk of that settlement resulted from the injunction. If such permanent injunctions are harder for nonusing patent owners to obtain, settlements will be smaller as well.

Although the Supreme Court itself was less than united on the question of how easy an injunction should be to obtain after proving infringement, empirical evidence suggests that—since *eBay*—courts have indeed become less likely to grant injunctive relief to strictly patent assertion entities.[277] This alone is quite a substantial shift in judicial behavior,[278] and it is very much in line with the approach we are advocating toward the right not to use in patent law. Yet that change alone leaves open an important question. District courts now take seriously *eBay*'s directive to focus on the equitable factors relating to the grant of injunctions.[279] A court must consider if the patent holder has "suffered an irreparable injury"[280] and if "remedies available at law are inadequate to compensate for that injury."[281] And if district courts are now generally denying injunctive relief for patent assertion entities, the question is, what facts are most salient for them? Are courts denying injunctive relief for the more modest rationale that "remedies at law" *are* adequate, or are they denying injunctive relief because there is no injury that warrants an injunction? It appears that at least the *presumption* of irreparable harm from infringement alone no longer stands and there is increased scrutiny on the actual harm caused by the infringement. The Federal Circuit recently held as much: "We take this opportunity to . . . confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief."[282] Even more recently, the Federal Circuit held that a showing of irreparable harm required "a sufficiently strong causal nexus [that] relates the alleged harm to the alleged infringement."[283]

Some have criticized the response to *eBay* in the lower courts as too broad and unfocused, one that threatens to undermine a richly developed system of presumptions and safety valves that have grown up around the use of injunctive relief within discrete areas of the

---

277 Golden, *supra* note 76, at 2113 ("[D]istrict courts have responded in apparent lockstep to Justice Kennedy's concerns [in *eBay*] about trolls. Since the Supreme Court issued its opinion in *eBay*, district courts appear to have consistently denied permanent injunctions in cases where an infringer has contested the patent holder's request for such relief and the infringer and patent holder were not competitors.").

278 *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 9–10 & fig.1 (2012).

279 *See* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012).

280 *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

281 *Id.* at 388.

282 Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1149 (Fed. Cir. 2011).

283 Apple Inc. v. Samsung Elecs. Co., 695 F.3d 1370, 1374 (Fed. Cir. 2012).

law.[284] Our approach, which would eliminate the presumption in favor of injunctive relief only in cases brought by nonusing patent owners against independent inventors, would cabin the reach of the developing remedial reform to those cases that generate the most damage in exchange for the least social benefit. The impact on existing law would be further mitigated by placing the burden on the defendant to show that, having been found to be an infringer, the standard presumption in favor of injunctive relief should not apply in a particular case because the defendant is an independent inventor.[285] After the defendant meets that burden, the court might then place the burden of proof on the plaintiff seeking an injunction to show that it was actively practicing the patent or seeking to disseminate the invention, rather than merely pursuing an opportunistic ex post strategy of licensing the patent. Importantly, a judge's decision not to grant injunctive relief because of a plaintiff's nonuse does not mean the plaintiff is left empty-handed.

B. Damages

The patent statute requires that the courts "award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer."[286] Courts have traditionally interpreted that statutory provision to allow damages that include nearly any but-for consequence of the infringement. As a result, courts have granted to patent assertion entities damages that exceed the value of the unexploited invention, often encompassing value generated by the defendant's efforts to commercialize the patented invention.

In *Rite-Hite Corp. v. Kelley Co.*, the Federal Circuit affirmed that the test

> for compensability of damages . . . is not solely a "but for" test in the sense that an infringer must compensate a patentee for any and all damages that proceed from the act of patent infringement. Notwithstanding the broad language of § 284, judicial relief cannot re-

---

284 *See* Gergen et al., *supra* note 279, at 205–06.

285 Exactly such an evidentiary burden was suggested by Learned Hand with respect to independent invention. *See The American Patent System: Hearing on S. Res. 92 Before the Subcomm. on Patents, Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 84th Cong. 114 (1956) (statement of Hon. Learned Hand, J.) (suggesting easing the thorny evidentiary issues relating to independent invention by "throw[ing] the burden on the supposed infringer to show that he did not have to have recourse to the patent in order to do what he did").

286 35 U.S.C. § 284 (2006 & Supp. V 2011). In addition, the court "may increase the damages up to three times the amount found." *Id.* These treble damages are used almost only in cases of willful infringement. *See, e.g.*, In re Seagate Tech., LLC, 497 F.3d 1360, 1368 (2007).

> dress every conceivable harm that can be traced to an alleged wrongdoing.[287]

Hopes that this line of reasoning would provide for a serious consideration of actual, provable harm in patent damages was quickly dispatched. The court gave examples of consequences that were too "remote . . . such as a heart attack of the inventor or loss in value of shares of common stock of a patentee corporation caused indirectly by infringement [to be] compensable."[288] Indeed, despite a vigorous dissent in the case,[289] the court held that damages were available even from lost sales of *un*patented items caused by the infringement.[290]

Just three months after *Rite-Hite*, the Federal Circuit decided *King Instruments Corp. v. Perego*, which gave even stronger support for an expansive vision of patent damages.[291] The court held that a

> patent confers the right to exclude others from exploiting an invention. . . .
>
> This understanding . . . informs the purpose and scope of the damages provision. . . . [A] patentee need not have exercised its natural right to itself make, use, or sell the invention. The damages section, section 284, protects the right to exclude, not the right to exploit. . . .
>
> . . . [T]he award of damages compensates for the violation of the patentee's right to exclude others from making, using, or selling the invention. The patentee need not make, use, or sell the invention to sustain an injury to that right.[292]

This passage makes clear the assumptions underlying the Federal Circuit's approach toward patent damages. The Federal Circuit simply assumes harm to exist whenever there is an unlicensed infringement of the right to exclude.

The current state of patent law as it relates to damages depends on the same flawed use of the property analogy we observe in *Continental Paper Bag*.[293] A balanced vision of patents, like the one we describe in Part III, would provide much needed correction within the law of patent damages as it relates to patent trolls. Indeed, numerous scholars have already been calling for reforms of patent damages. In particular, they have focused on nonpracticing patent owners who sue independent inventors.[294] Many of those scholars have argued for

---

287 Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1546 (Fed. Cir. 1995).

288 *Id.*

289 *Id.* at 1556 (Nies, J., dissenting).

290 *Id.* at 1546–47.

291 *See* King Instruments Corp. v. Perego, 65 F.3d 941, 949 (Fed. Cir. 1995).

292 *Id.*

293 *See, e.g.*, *id.* at 949 (holding that patent rights confer the right to exclude and not the right to exploit).

294 *See* Chiang, *supra* note 239, at 2–6; Paul J. Heald, *Optimal Remedies for Patent Infringement: A Transactional Model*, 45 HOUS. L. REV. 1165, 1199 (2008) (arguing that the notice

consideration of commercialization efforts as a factor in calculating damages.[295] Though those reforms have not yet found their way into patent law, there have been notable examples of judges calling for reforms along these lines.[296] Here, too, we think our arguments can help.

Above,[297] we argued in favor of denying injunctive relief in cases of infringement of nonused patent by independent inventors, not because patents are not property, but rather because, even as property, the balance of harms and benefits of nonuse and access are important considerations. Once we are forced to take into account the balance of harms in the ways described in Parts III and IV, the need to reform the law of patent damages seems to follow as a natural consequence.

Importantly, a reform as simple as tweaking burdens of proof could have a significant impact. For damages, the courts have long held that "the patent owner bears the burden of proof,"[298] and "a patent owner must prove a causal relation between the infringement and its loss."[299] Damages cannot "be speculative."[300] In an important recent case on patent damages, Chief Judge Rader, sitting by designation in Northern District of New York, held that "[a]n award of damages by the jury 'must be upheld unless . . . grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.' "[301] In other words, patent damages aim to compensate for some type of harm, and those harms need to be estab-

---

function of the patent system needs to be improved to address the troll problem); Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1810–14 (2007); David W. Opderbeck, *Patent Damages Reform and the Shape of Patent Law*, 89 B.U. L. REV. 127, 128–32 (2009); ,Ted Sichelman, *Purging Patent Law of 'Private Law' Remedies*, TEX. L. REV. (forthcoming) (manuscript at 1–3), *available at* http://ssrn.com/abstract=1932834; Turner, *supra* note 206, at 182; Brent Rabowsky, Note, *Recovery of Lost Profits on Unpatented Products in Patent Infringement Cases*, 70 S. CAL. L. REV. 281, 285–86 (1996); Carl Shapiro, *Patent Reform: Aligning Reward and Contribution* 111–14 (Nat'l Bureau of Econ. Research, Working Paper No. 13141, 2007), *available at* http://www.nber.org/papers/w13141; Samson Vermont, Basing Patent Remedies on Harm to the World Instead of Harm to the Patentee 3–8 (2012) (unpublished manuscript), *available at* http://www.stanford.edu/dept/law/ipsc/Paper%20PDF/Vermont,%20Samson%20-%20Paper.pdf; *see also* Blair & Cotter, *supra* note 208, at 74–84 (discussing in detail the economics of the idle patent).

295 *See, e.g.*, Turner, *supra* note 206, at 182–83.

296 *See* Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1556–57 (Fed. Cir. 1995) (Nies, J., dissenting); *King Instruments*, 65 F.3d at 954 (Fed. Cir. 1995) (Nies, J., dissenting).

297 *See supra* Part IV.A.

298 BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc., 1 F.3d 1214, 1217 (Fed. Cir. 1993).

299 *Id.* at 1218.

300 *Id.*; *see also* KIEFF ET AL., *supra* note 87, at 1250 ("The patent owner bears the burden of proving by a preponderance of the evidence the profits lost and cannot meet this burden with guesswork and speculation.").

301 Cornell Univ. v. Hewlett-Packard Co., 609 F. Supp. 2d 279, 292 (N.D.N.Y 2009) (quoting Monsanto Co. v. Ralph, 382 F.3d 1374, 1383 (Fed. Cir. 2004)).

lished by the patentee. And though it was a case focusing on injunctive relief, Justice Kennedy's concurrence in *eBay* noted that courts, with their wide "discretion," are "well suited . . . to adapt to the rapid technological and legal developments in the patent system" and "district courts must determine whether past practice fits the circumstances of the cases before them."[302] Whether they are conceiving of patent damages as lost profits or a reasonable royalty, courts awarding patent damages should require proof of the actual harm caused by the infringement in order to determine how much compensation the patent holder is due.

It is certainly true that the patent statute mandates a floor for patent damages. The statute states that damages should be "in no event less than a reasonable royalty for the use made of the invention by the infringer."[303] Though it establishes a floor, the statute does not preclude a court from determining the value of a "reasonable royalty" by considering an owner's lack of commercialization efforts. In cases where an owner is not practicing the patent or actively disseminating the invention, reasonable royalties might even be limited to an award of nominal damages.[304] Indeed, in light of the information costs imposed by nonpracticing entities and the lack of any nonspeculative harm for infringement of an unused patent, it is quite sensible to condition reasonable royalties on efforts to commercialize. Suggestions along those lines already exist in the literature.[305] Furthermore, in light of the existing burden of proof for damages and a district court's

---

302 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 397 (2006) (Kennedy, J., concurring).

303 35 U.S.C. § 284 (2006 & Supp. V 2011).

304 Design patents are an exception. They are protected by their own, more explicit damages provision. *See* 35 U.S.C. § 289 (2006). According to § 289, infringers of a design patent must disgorge their "total profit." Although the provision leaves some ambiguity as to the proper way to determine "total profit," its focus is on the gain to the infringer rather than the harm inflicted on the patent owner. *See id.* Arguably, for design patents, reforming the damages remedy along the lines we suggest would require a statutory amendment. *See* Mark A. Lemley, *A Rational System of Design Patent Remedies* 16–21 (Stanford Pub. Law & Legal Theory Research Paper, Paper No. 2226508, 2013), *available at* http://ssrn.com/abstract=2226508. But note that historically, design patent remedies were largely consistent with the arguments made in this Article. Our focus has been on the reform of patent remedies in the context of a nonusing patent holder suing an independent inventor. Our arguments do not reach the question of the proper patent remedy for cases of copying, and indeed stronger remedies are likely justified in those cases. Consistent with that distinction, *historically*, design patents did allow recovery of the infringer's "entire profit," *but* "Congress wasn't too worried about the potential unfairness of the entire profit rule in 1887 because the knowledge requirement was thought to limit the scope of design patent litigation to true copyists." *Id.* at 5. Afterward, in 1952, Congress removed that knowledge requirement from the statute leading to our current expansive design patent damages available even against independent inventors. *Id.* at 5 n.19.

305 *See* Heald, *supra* note 294, at 1174–75.

discretion in these matters (as reemphasized by *eBay*), district courts already have the tools necessary to implement such reforms.[306]

It is important to emphasize, again, that these reforms are supported by embracing patents as property. After all, as we observed above, in the context of the innocent improver, where the law of tangible property denies an owner injunctive relief but requires compensation to the nonusing property owner, it measures compensation as the fair market value of the undeveloped land. It does not typically give the owner a share of the value added by the improver.[307] Since *eBay*, patent assertion entities are having a hard time proving the type of harm that merits injunctive relief.[308] Recognizing that such a showing of harm is already part of patent damages suggests that such entities may soon encounter similar difficulties establishing that they are entitled to exorbitant damage awards.[309]

---

306 In fact, Judge Posner, sitting by designation in *Apple, Inc. v. Motorola, Inc.*, explored the issue of nominal damages for cases where no harm was found despite a finding of infringement. *See* Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 909 (N.D. Ill. 2012) ("I want to dispel any impression that such relief—substantial 'compensatory' damages for no tangible injury—would be proper . . . .").

307 *See supra* notes 133–41 and accompanying text. The same holds true in the context of chattels when measuring damages for accession. *See, e.g.*, Hyde & Everit v. Cookson, 21 Barb. 92, 105–06 (N.Y. Gen. Term 1855) (awarding the value of the unimproved raw materials in a case of accession).

308 *See* Chien & Lemley, *supra* note 278, at 9–10.

309 It might at first appear that another avenue to achieve similar results would be to use the defenses of laches and equitable estoppel. As currently defined, however, these doctrines are unlikely to provide much help. As to laches, the courts have prevented recovery in cases where the plaintiff has failed to act reasonably prudently to file a case and "the delay resulted in material prejudice or injury to the defendant." Gasser Chair Co. v. Infanti Chair Mfg. Corp., 60 F.3d 770, 773 (Fed. Cir. 1995). Certainly, the harm from the most egregious cases of patent assertion, where waiting was a calculated matter, could be made to fit within the doctrine. Unfortunately, the doctrine has generally been limited to a time period before the filing of the lawsuit and that delay period "cannot begin prior to the time the patent owner has a legally sufficient infringement claim." 6-19 DONALD S. CHISUM, CHISUM ON PATENTS § 19.05[2][a][i] (2012) (citing Adelberg Labs., Inc. v. Miles, Inc., 921 F.2d 1267, 1272 (Fed. Cir. 1990) ("Laches applies until the date of suit.")). Those constraints limit the effectiveness of laches for curbing patent assertion abuses. Once a potential infringer has taken affirmative acts that create "a legally sufficient infringement claim," they likely have already made the business and technological decisions that lock them into a very unfavorable bargaining position with respect to the patentee. *Id.* The closely related doctrine of equitable estoppel also has potential, but has been interpreted in ways that make it unlikely to help. That doctrine limits recovery when a "patent owner through conduct, positive statement, or misleading silence represents to the infringer that his business will be unmolested by claims of infringement, and . . . in reliance on that representation, the infringer continues or expands his business." *Id.* § 19.05[3]. Few patent assertion entities would make such representations. Both doctrines only penalize patent holders when they are delinquent in *asserting their patent rights.* But our argument is that actively policing and asserting their exclusive rights is not enough. The law should, in addition, encourage active dissemination of the *invention to those that have not yet independently acquired it.* As a result, at least as currently understood, these doctrines are not enough.

C. Patent Misuse and Patent Nonuse

In the preceding sections, we have argued that, drawing on the analogy with tangible property, patent remedies, both injunctions and damages, should be weaker for nonpracticing entities when they are suing independent inventors. If one were to argue that, in the case of nonpracticing entities, patent remedies should vanish against all defendants, then that argument might run afoul of an explicit statutory command. 35 U.S.C. § 271(d) states that "[n]o patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse . . . by reason of his having . . . refused to license or use any rights to the patent." Other proposals to moderate remedies for patent assertion entities have noted that § 271(d) represents a potential obstacle.[310] Instead, our proposal stops short of rendering patents owned by nonpracticing entities totally unenforceable in a way that would constitute a denial of relief within the meaning of § 271(d). Our proposal maintains both the presumptive validity and enforceability (even by injunction) of patents owned by nonpracticing entities. It merely limits the remedies of such owners in infringement lawsuits against independent inventors. For example, even nonpracticing entities may well have some real remedy against copyists who acquired the invention from the published patent despite the lack of active dissemination. And even outside the case of copyists, nonpracticing entities would not be totally foreclosed but would instead carry a burden of showing concrete harm before they could obtain injunctive relief or damages. Because most of them would not be able to carry that burden, the result would be much less aggressive remedies than those enjoyed by similarly situated, practicing entities.

Conclusion

Courts and scholars often invoke property law in patent debates in order to defend absolutist positions within patent law. This has been particularly true of patent law's treatment of the right not to use. This Article has shown that comparing property and patent can be a fruitful undertaking and does not necessarily lend itself to absolutist patent rights. The right not to use is instructive. Tangible property law looks at nonuse with a balanced eye that aims to make room for a great deal of owner control over the timing of use while preventing nonuse from harming others, either by depriving them of resources they badly need, inducing them to waste time and effort, or interfering with the use and enjoyment of their own property. Moreover,

---

310 *See* Turner, *supra* note 206, at 182 n.13 (arguing that because her proposal focused only on injunctive relief, it did not run afoul of § 271(d)).

looking to the normative considerations at work behind the law's treatment of the right not to use, tangible property reveals that the differences between property rights in tangible things and patent rights in ideas tilt the balance even more decidedly against recognizing a robust right not to use in patent. Thus, far from supporting an absolute right not to use in patent, as the Supreme Court suggested in *Continental Paper Bag*, the analogy with property supports a far more constrained right not to use, particularly against independent inventors.